DOCKET

No. 83-1360-CFX
Status: GRANTED

Title: Leonard Webb, Petitioner
v.
County Board of Education of Dyer County, Tennessee, et al.

Docketed:
February 14, 1984

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Ralston, Charles Stephen

Counsel for respondent: Headrick, S. Russell

Entry	Date	Note	Proceedings and Orders
1	Feb 14 1984	G	Petition for writ of certiorari filed.
2	Mar 14 1984		Brief of respondents Co. Bd. of Ed., Dyer Co., Tn, et al. in opposition filed.
3	Mar 21 1984		DISTRIBUTED. April 13, 1984
4	Apr 16 1984		Petition GRANTED.
5	May 25 1984		Order extending time to file brief of petitioner on the merits until June 8, 1984.
7	Jun 8 1984		Brief of petitioner Leonard Webb filed.
8	Jun 8 1984		Joint appendix filed.
9	Jun 27 1984		Record filed.
10	Jun 27 1984		Certified joint appendix & C.A. proceedings received.
12	Jul 3 1984		Order extending time to file brief of respondent on the merits until July 18, 1984.
13	Jul 9 1984		Brief amicus curiae of Equal Employment Advisory Council filed.
14	Jul 13 1984		Order further extending time to file brief of respondent on the merits until July 23, 1984.
15	Jul 19 1984		Brief of respondents Co. Bd. of Ed., Dyer Co., Tn, et al. filed.
16	Aug 21 1984		CIRCULATED.
17	Aug 28 1984		SET FOR ARGUMENT, Monday, October 29, 1984. (4th case)
18	Oct 17 1984	X	Supplemental brief of respondent Co. Bd. of Ed., Dyer Co., TN filed.
19	Oct 19 1984	X	Reply brief of petitioner Leonard Webb filed.
20	Oct 29 1984		ARGUED.

PETITION FOR WRIT OF CERTIORARI

No. 83-1360

FILED
FEB 14 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LEONARD WEBB,

Petitioner,

v.

COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Questions Presented

The Court of Appeals for the Sixth Circuit held that the petitioner could not recover attorneys' fees under 42 U.S.C. § 1988 in a civil rights case for work done in an administrative proceeding that was not required to be exhausted as a condition to filing the action in federal court. Four other circuits have held to the contrary.

Should the Court resolve this conflict between the circuits on this important issue that concerns the effective enforcement of the civil rights acts?

PARTIES

Leonard Webb, petitioner. County Board of Education of Dyer County, Tennessee, Franklin Cobb, Jimmy Adams, Ernest Gullett, John H. Hooper, Terry W. Jones, Mary F. McCauley, William Pierce, Dan Tickle, Johnny Earl Vickers, Herman Reed,

Dwight L. Hedge, Clayton Hayes, Bill Deere, Charles Maxey, Harold Willis, A. W. Roody, Bobby Switzer, Jerry Mussall, John Fisher, Allen Hines, Franklin Rhodes, C. J. Vinson, Helen Bell, Ira Powers, Bobby Bowen, respondents.

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No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

LEONARD WEBB,

Petitioner,

v.

COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Leonard Webb, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on August 29, 1983, petition for rehearing denied November 16, 1983, affirming the

decision of the United States District Court for the Western District of Tennessee.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 715 F.2d 254 and is set forth in the Appendix at pages 1a-25a. The order of the Court of Appeals denying rehearing is unreported and is set forth in the Appendix at pages 26a-27a. The opinion of the District Court is unreported and is set forth in the Appendix at pages 28a-43a.

JURISDICTION

The judgment of the Court of Appeals affirming the decision of the District Court was entered on August 29, 1983. A timely petition for rehearing and for rehearing en banc was filed and was denied on November 16, 1983. Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves 28 U.S.C. § 1988, which provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318 . . . or Title VI of the Civil Rights Act of 1964 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
>
> (R. S. § 722; Oct. 19, 1976, P. L. 94-559, § 2, 90 Stat. 2641.)

STATEMENT OF THE CASE

The present action was brought pursuant to 42 U.S.C. §§ 1988, 1983, 1985, 1986, 1988 and 2000d. The petitioner, Leonard Webb, was a tenured black elementary school teacher who was discharged from his job in 1974 in the wake of the desegregation of the schools in Dyer County, Tennessee. The discharge was allegedly for "unprofessional conduct and insubordination". However, the

Board did not provide petitioner a copy of the written charges against him or give him a hearing. After receiving the letter of dismissal, petitioner hired counsel to represent him. Counsel requested an immediate hearing before the Board of Education which was ultimately granted. There were a series of hearings at which counsel elicited testimony from several witnesses, including the school board's employees, that tended to prove that Mr. Webb had been fired because of racial discrimination. At the school board hearings counsel raised both equal protection and due process objections to the discharge.

In August, 1978, the board rendered its final decision upholding the original decision to terminate petitioner. Petitioner then filed the present action in federal court challenging his discharge on

both equal protection and due process grounds.

The defendants filed motions for summary judgment. In opposition to those motions respondent filed the transcript of the proceedings before the school board. While the motions were pending, the parties reached a settlement under which respondent received damages in the amount of $15,400, and a decree ordering the Board to treat the plaintiff as having resigned and to place no disparaging remarks on his professional record. The district court accepted the settlement with only the transcript of the state administrative proceedings before it as evidence of the facts.

Following settlement on the merits the parties attempted to settle the question of attorneys' fees. Although they were in agreement that respondent was the prevail-

ing party and should receive some fees, they were unable to agree on the amount. A motion was therefore filed before the District Court, which awarded fees for the work performed following the filing of the complaint in federal court. Fees were denied for work performed before the complaint was filed on the ground that the court believed no authority existed for the award of attorneys' fees under 42 U.S.C. § 1988 for work in a state administrative proceeding that was not required to be exhausted as a condition to filing an action in federal court. (App. pp. 31a-41a) On appeal a panel of the Sixth Circuit affirmed the District Court's order and rehearing en banc was denied. (App. pp. 1a-27a.)

REASONS FOR GRANTING THE WRIT

I.

THE CASE PRESENTS AN IMPORTANT ISSUE AFFECTING THE ENFORCEMENT OF THE CIVIL RIGHTS LAWS

The present case involves an important issue relating to the circumstances under which fees may be awarded to a party who prevails on a civil rights claim as a result of work done in a state administrative proceeding prior to the actual filing of an action in federal court. The decision below, as the court admitted (App. pp. 14a-16a), is in square conflict with the decisions of four other circuits, is in conflict with the decision of this Court in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), and is contrary to the intent of Congress when it enacted the Civil Rights Attorneys' Fee Act of 1976.

The importance of the issue arises both from the frequency with which it has arisen in the lower courts and from the potential deleterious effect on the workload of the federal courts if it is allowed to stand. A total of nine courts of appeals have dealt with the issue in various ways, as will be discussed in Section II below, and it is likely to be a recurring issue in a number of contexts. For example, in a proceeding cognizible under Title VII of the Civil Rights Act of 1964, a party may seek relief not only pursuant to state and federal administrative proceedings which must be exhausted as a precondition to filing an action under title VII,[1] but also may pursue alternative remedies such as complain-

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1/ 42 U.S.C. § 2000e-5(b)-(e).

ing to the Office of Federal Contract Compliance of the Department of Labor[2] or through a union grievance procedure.[3]

The often successful use of such proceedings would necessarily be discouraged if potential Title VII plaintiffs knew that counsel fees had to be paid out of their own pockets. Conversely, attorneys who have taken such cases, as is often the fact, on a contingency basis would be loath to pursue such remedies with the knowledge that they would receive no compensation for their work even if successful.

The only result, as noted by this Court in New York Gaslight Club, Inc. v.

2/ See, Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982).

3/ See, Sullivan v. Commonwealth of Pennsylvania Dept. of Labor and Industy, 663 F.2d 443 (3rd Cir. 1981).

Carey, 447 U.S. at 65-66, would be to encourage unnecessarily the immediate filing of actions in federal court and the circumvention of alternative remedies. This, of course, would mean that cases would be either unnecessarily filed or that the use of alternative remedies to dispose of cases would be avoided. This would burden the courts and would be contrary to the intent of Congress when it passed both the various civil rights statutes and Attorneys' Fee Act.

II.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The court of appeals below held that only administrative remedies required to be exhausted as a precondition for filing an action in federal court could result in attorneys' fees. Moreover, ignoring the plain language of the statute, they read

the legislative history of the 1976 Attorneys' Fee Act as intending it to cover only suits in court and not in administrative proceedings. The courts of appeals of the Seventh, Eighth, Ninth and District of Columbia Circuits, in a variety of contexts, have reached inconsistent results. See, Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982); Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982); Brown v. Bathke, 588 F.2d 634 (8th Cir. 1978); Bartholomew v. Watson, 665 F.2d 910 (9th Cir. 1982); Kulkarni v. Alexander, 662 F.2d 758 (D.C. Cir. 1978). Four other circuits, on the other hand, have decided the issue similarly to the Sixth Circuit. See Blow v. Lascares, 523 F. Supp. 913 (N.D.N.Y. 1981), aff'd, 668 F.2d 670 (2nd Cir. 1981); Latino Project Inc. v. City of

Camden, 701 F.2d 262 (3rd Cir. 1983);[4/] Redd v. Lambert, 674 F.2d 1032 (5th Cir. 1982); and Estes v. Tuscaloosa County, 696 F.2d 898 (11th Cir. 1983). Because of the importance of the issue, certiorari should be granted to resolve this conflict.

III.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS OF THIE COURT

In New York Gaslight Club, supra, this Court held that attorneys' fees may be awarded in a Title VII action for work done in a state administrative proceeding prior to the filing of an action in federal court. The decision in Carey was based primarily on an analysis of the language of

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4/ But see, Sullivan v. Commonwealth of Pennsylvania Dept. of Labor and Industries, 663 F.2d 443 (3rd Cir. 1981), holding that the time for work done in a union arbitration proceeding that contributed to the successful outcome of a Title VII case was compensable.

the statute which provides that fees may be awarded in any "action or proceeding" under Title VII. In so deciding the Court relied on the legislative history of the 1976 Act since the language of the Acts were virtually identical and their purposes were the same. Section 1988 also provides that fees may be awarded in "any action or proceeding" to enforce various civil rights statutes.

The Court below distinguished Carey on the ground that it involved state administrative proceeding that had to be exhausted before a Title VII action could be brought. Petitioner contends that Carey is not so limited and, indeed, such a reading of Carey would essentially nullify a provision of the statute.

It is true that under Title VII it is required that a potential plaintiff first exhaust certain administrative remedies

before bringing suit and no such exhaustion requirement is imposed as a condition to bringing an action under 42 U.S.C. §§ 1981 - 1986.[5/] However, the Title VII requirement is only that complainants file with the Equal Employment Opportunity Commission, and with a state agency if one is available. There is no requirement that complainants do any more than to wait the required length of time before receiving a right to sue letter and bringing an action. Similarly, under the provision of Title VII governing federal employees (42 U.S.C. § 2000e-16) all that is required is that an administrative complaint be filed. Section 2000e-16(c) specifically provides that an action may be filed in federal court after 180 days have elapsed

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5/ Patsy v. Florida Bd. of Regents, ___ U.S. ___, 73 L.Ed. 2d 172 (1982).

regardless of whether or not anything has been accomplished in the administrative process.

In Carey however, as well as in the federal employment cases[6/] cited there with approval,[7/] the award of fees was affirmed where the complainant had done much more than simply comply with the minimal exhaustion requirements imposed by the statute. In Carey the complainant had pursued her administrative remedies through to decision although it is clear she could have terminated them and gone into federal court at a far earlier stage. Similarly, in the federal sector cases, such as Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977), the complainants had stayed in the adminis-

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6/ Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977); Johnson v. United States, 554 F.2d 632 (4th Cir. 1977).

7/ 447 U.S. at 61, n. 2.

trative process much longer than the required 180 days and had received full relief rather than exercising their right to go to federal court at an earlier stage.

There is no hint or suggestion in Carey that fees are awardable only for work or time required to be spent in the administrative process. Rather, Carey was based on the principle that complainants should be encouraged to utilize to the full available alternative remedies to avoid the otherwise natural result of their spending the minimal time required in the administrative process before coming to federal court if that were the only place where fees could be obtained. 447 U.S. at 65.

Moreover, the ruling that fees are available under § 1988 only for legal work done in connection with or as a required precondition for an action brought in

federel court is fundamentally inconsistent with this Court's decision in Maine v. Thiboutot, 448 U.S. 1 (1980). There, this court held that fees were recoverable in a state court "action" brought to enforce rights protected by § 1983. It necessarily rejected the principle that fees were limited to federal court actions, and it follows that the plain meaning of the statute also encompasses a state administrative "proceeding" brought to enforce the same statute.

Therefore, the decisions of the Seventh, Eighth, Ninth and District of Columbia Circuits holding that fees are available for work done in any available alternative remedy is fully consistent with Carey and Thiboutot and indeed is required by the rationale of those decisions. Conversely, the decision of the court below is in fundamental conflict with them

IV.

THE DECISION BELOW IS INCONSISTENT WITH THE STATUTE AND CONFLICTS WITH CONGRESSIONAL PURPOSE

The effect of the Sixth Circuit's decision is simply to read out of 42 U.S.C. § 1988 the language providing for attorneys' fees in any "proceeding" as well as in any "action." Such a result is contrary to basic principles of statutory construction, as well as with the decision in Carey. The rationale for the decision below was that petitioner was not required to exhaust the available remedy of seeking a hearing before the School Board as a precondition as to filing an action in federal court since there is no exhaustion requirement for actions brought under 42 U.S.C. § 1983.

The problem with the Sixth Circuit's reasoning is that under no circumstances need any administrative remedy be exhausted before an action can be brought under that statute.[8/] Therefore, as a practical matter there would never be any "proceeding" other than a court "action" for which attorneys' fees could be awarded. Such a result cannot be allowed, particularly since when Congress wished to exclude the recovery of fees for proceedings other than a court action, it has clearly done so. Thus, under Title II of the Civil Rights Act of 1964[9/] fees are obtainable only for "actions" brought in federal court even though there are available state administrative proceedings to enforce the right to equal access to public accommodations in

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8/ Patsy v. Florida Bd. of Regents, supra.

9/ 42 U.S.C. § 2000a-3(b).

many jurisdictions.

Further, the court of appeals' decision conflicts with the clear intent of Congress when passing the Civil Rights Attorneys' fee Act since its basic purpose was to encourage and facilitate the enforcement of civil rights through making attorneys' fees broadly available.[10/] Any interpretation of the statute that conflicts with that purpose should be rejected.

10/ See S. Rep. No. 94-1011 (94th Cong. 2d Sess.) pp. 4-5; H. Rep. No. 94-1558 (94th Cong. 2d Sess.) pp. 1-3.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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APPENDIX

DECISION OF COURT OF APPEALS,
Aug. 29, 1983

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LEONARD WEBB,

Plaintiff-Appellant
Cross-Appellee,

v.

COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, et al.,

Defendants-Appellees,
Cross-Appellants.

Nos. 82-5154, 82-5158

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UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

Argued May 17, 1983.
Decided Aug. 29, 1983.

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Before CONTIE and KRUPANSKY, Circuit Judges, and GUY, District Judge.*

CONTIE, Circuit Judge.

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* The Honorable Ralph G. Guy, Jr., U.S. District Judge for the Eastern District of Michigan, sitting by designation.

The primary issue on this appeal is whether 42 U.S.C. § 1988 allows an award of attorney's fees in 42 U.S.C. § 1981 litigation for services rendered in optional state administrative proceedings. We hold that it does not.

I.

Leonard Webb, the plaintiff, was a tenured black teacher in the Dyer County schools. The Board suspended him in March, 1974 pending the investigation of unspecified charges. It terminated the plaintiff two weeks later on grounds of unprofessional conduct and insubordination which had been brought to its attention by parents and school administrators. The Board did not, however, provide Webb with written charges and a hearing before taking this action.

The plaintiff subsequently demanded and received a hearing at which he attempted to show that the discharge was unjustified. Nearly four years later, the Board issued a final decision which upheld the discharge. Webb then filed suit under 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988 and 2000d, alleging that he had been terminated on account of his race.

The parties eventually settled the case. Pursuant to his § 1981 claim, Webb received $15,400 in damages and a decree ordering the Board both to treat the plaintiff as having resigned and to place no disparaging remarks on his professional record. The matter of attorney's fees was reserved.

When the parties were unable to agree on this issue, the court awarded over

$9,700 in fees for services rendered by plaintiff's counsel before the district court but denied attorney's fees for efforts devoted to the state administrative hearing. The court held that § 1988 authorizes attorney's fees for work performed in administrative proceedings only where those proceedings are a prerequisite to filing suit in federal court. Since Webb was not required to exhaust state administrative remedies before filing a § 1981 claim, his attorney was not entitled to fees. The plaintiff appeals the partial denial of fees. The defendants cross-appeal the partial award of fees on the alternative grounds that Webb has not fully prevailed and that the amount awarded per hour was excessive.

II.

In interpreting § 1988, this court is "to use the broadest and most effective remedies available to achieve the goals of our civil rights laws." S.Rep. 94-1011, 94th Cong., 2d Sess. 3 (1976), U.S.Code Cong. & Admin. News 1976, pp. 5908, 5910. Nevertheless, we are mindful that only Congress has the prerogative to establish exceptions to the general rule that prevailing litigants must bear their own attorney's fees. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Hence, in construing the attorney's fees statute liberally, this court may not go further than Congress intended. To discover that intent, we look primarily to the statute

itself and to the legislative history. Northcross v. Board of Education, 611 F.2d 624, 632 (6th Cir. 1979), cert. denied, 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980).

In pertintent part, 42 U.S.C. § 1988 provides:

> In any action or proceeding to enforce a provision of §§ 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Since this provision tracks the language of titles II and VII of the Civil Rights Act of 1964, S.Rep. No. 94-1101, supra at 2; H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 5 (1976), the plaintiff requests us to extend the Supreme Court's holding in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980).

In Carey, the plaintiff invoked state administrative and court remedies before filing a title VII action. After the defendant agreed prior to trial to comply with the results of the state proceedings, the case was dismissed on all issues except attorney's fees. The court construed title VII's fee provision[1/] as entitling plaintiff's counsel to payment for work done in administrative proceedings. First, the phrase "action or proceeding" was held to contemplate administrative proceedings. The court compared the attorney's fee provisions of title II and title VII and noted that

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1/ 42 U.S.C. § 2000(e)-5(k). The provision reads:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs.

title II, which is enforceable solely by court suits, only compensates services that are rendered during "actions." Conversely, title VII, which is enforceable through both administrative and judicial channels, compensates work done in "actions or proceedings." The court ruled that in order for the term "proceedings" not to be surplusage, it must refer to administrative actions. Id. at 61, 100 S.Ct. at 2029. Second, the court reasoned that since title VII plaintiffs are required to pursue administrative remedies, attorney's fees must be available to compensate counsel's efforts during such proceedings. Otherwise, plaintiffs would be deterred from asserting meritorious claims by the prospect of having to pay fees. Id. at 63, 100 S.Ct. at 2030.

Despite the plaintiff's urgings to the contrary we hold that the analysis in Carey does not control the present case.[2/] Although title VII provides for payment of attorney's fees in "actions or proceedings" whereas title II permits compensation only in "actions," Congress indicated that the wording of § 1988 follows the language of both title II and title VII. It is therefore difficult to infer that Congress intended the phrase "action or proceeding" in § 1988 to cover services rendered in

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2/ At oral argument, the plaintiff argued that in light of Hensley v. Eckerhart, ___ U.S. ___, 103 S.Ct. 1933, 1939, n.7, 76 L.Ed.2d 40 (1983), precedents arising under title VII and § 1988 are interchangeable. Hence, it is said that Carey must be applied to this case. Although Hensley did hold that its principles applied to both title VII and § 1988 cases, the statement occurred in the context of discussing who is a "prevailing party." In contrast, we consider the different question of whether a party who we hold to have prevailed (see Part III, infra) is entitled to attorney's fees for work done in optional administrative proceedings. Accordingly, this court is not precluded from distinguishing Carey.

pursuing optional administrative remedies. Since Congress referred to two statutes, one of which allows attorney's fees for such work while the other does not, the phrase "action or proceeding" in § 1988 is ambiguous.

Secondly, there is no congressional policy requiring plaintiffs who sue under the specific provisions listed in § 1988 to exhaust administrative remedies. Latino Project, Inc. v. City of Camden, 701 F.2d 262, 264 (3d Cir. 1983); Blow v. Lascaris, 523 F.Supp. 913, 916 (N.D.N.Y. 1981), affd. 668 F.2d 670 (2d Cir., cert. denied, ___ U.S. ___, 103 S.Ct. 225, 74 L. Ed.2d 179 (1982). See, e.g., Patsy v. Board of Regents, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) (§ 1983); Cannon v. University of Chicago, 441 U.S.

677 706-08 n. 41, 99 S.Ct. 1946, 1962-63 n. 41, 60 L.Ed.2d 560 (1979) (title IX). This court has held, for instance, that plaintiffs bringing employment discrimination claims under § 1981 need not exhaust the administrative remedies which are available under title VII. Long v. Ford Motor Company, 496 F.2d 500, 503 (6th Cir. 1974). Since Webb could have filed suit under § 1981 without pursuing administrative remedies, he would not have been deterred from asserting his federal rights had he known that fees would be unavailable to compensate his attorney for work done in the optional proceedings. Thus, the problem faced by the plaintiff in Carey is not present here.

The proper approach to the question at hand has been taken to the Second, Third, Fifth and Eleventh Circuits. Three of those circuits have held that § 1988 does not provide an independent cause of action for attorney's fees earned in optional administrative proceedings. Latino Project, supra; Estes v. Tuscaloosa County, 696 F.2d 898, 901 (11th Cir. 1983); Lascaris, supra. The Fifth Circuit has held that where "state proceedings do not form an integral part of the federal remedy," attorney's fees are unavailable under § 1988 for work done in such proceedings. Redd v. Lambert, 674 F.2d 1032, 1037 (5th Cir. 1982). Since the plaintiff in this case was not required to pursue administrative relief, those proceedings clearly were not an integral part of his § 1981 remedy.

Plaintiff's counsel attempts to distinguish the decisions from the Second, Third and Eleventh Circuits on the ground that the plaintiffs in those cases prevailed at the administrative level and sued in federal court only for attorney's fees, whereas Webb lost during administrative proceedings and was forced to seek substantive relief as well. This argument is faulty because it makes the availability of attorney's fees dependent upon the fortuitous circumstance of whether the ultimately prevailing plaintiff won or lost at the administrative level. Since the weight of authority holds that plaintiffs who prevail during optional administrative proceedings are not entitled to attorney's fees under § 1988, we hold that plaintiffs who lose during such proceedings, but who eventually prevail, are not entitled to fees either.

without analysis and in reliance upon three title VII cases, that attorney's fees for services rendered in administrative proceedings are available at the discretion of the trial judge. As has been indicated, however, title VII cases in which plaintiffs are required to exhaust administrative remedies are not persuasive concerning the issue at hand.

The Seventh Circuit also would grant attorney's fees to Webb. See Ciechon v. City of Chicago, 686 F.2d 511, 524-25 (7th Cir. 1982); cf. Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982)(title VII case involving optional administrative proceedings). The Ciechon decision's interpretation of the phrase "action or proceeding" and its application of the policies underlying Carey have been rejected for reasons already stated. We therefore decline to follow the seventh circuit's

The Supreme Court's opinion in Carey supports this conclusion. The court there held that the availability of compensation for administrative work "should not depend upon whether the complainant ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees." 447 U.S. at 66, 100 S.Ct. at 2032. A title VII plaintiff may therefore sue for attorney's fees in federal court regardless of whether he won or lost at the administrative level. Although the final result differs in § 1988 cases, the underlying principle cited above nevertheless applies.

We acknowledge the existence of case law supporting Webb's position. In Brown v. Bathke, 588 F.2d 634, 638 (8th Cir. 1978),[1] a § 1983 case, the court held,

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[1] Brown was criticised in Hensley, 103 S. Ct. at 1940-41 n. 11, but not on this point.

rule.[4/]

Furthermore, we infer from the legislative history of § 1988 that Congress did not intend attorney's fee awards for optional administrative work. Although the legislative history does not directly address this issue, the Senate Report's statement of purpose contains the following language:

> The purpose and effect of S. 2278 are simple -- it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866....
>
> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental

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4/ Bartholomew v. Watson, 665 F.2d 910 (9th Cir. 1982), does not support Webb's position. The plaintiff in Bartholomew was required to exhaust state remedies pursuant to the Pullman abstention doctrine. The decision therefore is more akin to Carey than to the present case.

> laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. [Emphasis supplied.]

S.Rep. No. 94-1011, supra, at 2, U.S.C.Code Cong. & Admin. News 1976, pp. 5908, 5909-5910. The notion that attorney's fees are available only for services rendered in court permeates the entire document. For instance, the Report's final substantive comment is that:

> Enforcement of laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases. [Emphasis supplied.]

Id. at 6, U.S. Code Cong. & Admin. News 1976, p. 5913.

Language in the House Report is consistent with this interpretation:

> In many instances where [the civil rights] laws are violated, it is necessary for the citizen to initiate court action to correct the illegality .... Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. [Emphasis supplied.]

H.R.Rep. No. 94-1558, supra, at 1. The Report then states that § 1988 is designed "to give [plaintiffs] effective access to the judicial process." Id. Finally, other courts which have considered the legislative history agree that Congress did not intend compensation for services rendered in optional administrative proceedings. See Latino Project, 701 F.2d at 264; Loscaria, 668 F.2d at 671.

The plaintiff raises two counter-arguments. First, the House Report cites Parker

v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976), affd. sub nom. Parker v. Califano, 561 F.2d 320 (D.C.Cir. 1977), for the proposition that a plaintiff who obtains relief through a consent decree rather than through a trial on the merits is entitled to attorney's fees. H.R.Rep. No. 94-1558, supra, at 7. Although this holding is unexceptional, some of the fees awarded in Parker were for services rendered in administrative proceedings. Parker is distinguishable, however, on the ground that it is a title VII case. Moreover, even if the reference to Parker supports Webb's position, that isolated instance does not outweigh the numerous indications throughout the legislative history that Congress intended only work done in court proceedings to be compensable under § 1988.

Second, Webb points out that in calculating attorney's fees, the courts are to include "all time reasonably expended on a matter" and are to use the same standards as are used in complex litigation such as antitrust so that the value of counsel's services will not be reduced simply because "the rights involved may be nonpecuniary in nature." S.Rep. No. 94-1011, supra, at 6, U.S. Code Cong. & Admin. News 1976, p. 5913. The plaintiff argues that the time devoted to the optional administrative process in this case was time that was "reasonably expended."

The error in this argument, as we have previously indicated, is that there is no congressional policy favoring exhaustion of administrative remedies before bringing suit under the statutes listed in § 1988. Moreover, the Supreme Court has said that there is disagreement over whether judicial or administrative procedures offer "the swiftest, least costly and most reliable remedy" in § 1983 litigation. Patsy, 102 S.Ct. at 2566 & n. 15. There is no reason not to apply this comment to § 1981 actions. We therefore conclude that time spent during optional state administrative proceedings is not time "reasonably expended" for purposes of § 1988.

Second, the directive to use the same standards as are used in other types of complex litigation in placing a value upon counsel's services only becomes operative if those services fall within the purview of § 1988. Since we have held that the administrative work done by Webb's counsel is not compensable, the cited instruction is irrelevant.

III.

On cross-appeal, the defendants argue that the award of attorney's fees for services rendered before the district court must be reduced either because Webb did not fully prevail on his § 1981 complaint[5/] or because the amount awarded per hour was excessive.

Although the plaintiff's complaint originally was filed as a class action, no class was ever certified and Webb obtained only individual relief pursuant to the settlement agreement. The defendants admit that Webb is a prevailing party who is entitled to attorney's fees. They nevertheless argue that because of the limited re-

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5/ The defendants have raised this issue in a supplemental brief filed after oral argument. The court has allowed the brief to be filed because defendants' argument implicates the Supreme Court's decision in Hensley, which was decided one day before the oral argument in the present case.

lief obtained, the plaintiff's attorney's fee must be reduced for it to be "reasonable" under Hensley v. Eckerhart, ___ U.S. ___, 103 S.Ct. 1933, 1976 L.Ed.2d 40 (1983). They first contend that since the plaintiff's individual claims are "unrelated" to his class action claims, id. at 1940, his attorney is not entitled to compensation for time spent drafting the class allegations in the complaint. Having reviewed the complaint, however, we hold that the individual and class allegations are sufficiently related such that no reduction in fees is merited on this ground.

Second, the defendants argue that however significant Webb's individual relief, may be, it "is limited in comparison to the scope of the litigation as a whole," id. at 1943, because the complaint asserted a class action. This case did not

proceed to trial, however; nor is there any demonstration that significant pre-trial preparation was devoted to the class allegations. Under these circumstances, the defendants' argument is reducible to the notion that whenever a plaintiff settles for individual relief and the complaint happens to include class allegations, the plaintiff's attorney's fee must be reduced. We decline to adopt such a rigid rule.

Third, the defendants contend that the plaintiff's attorney inadequately documented the number of hours devoted to the district court proceedings. We have reviewed the affidavit of plaintiff's attorney and conclude that this argument is without merit. Finally, the defendants assert that the amount awarded to plaintiff's attorney was excessive. We hold that the district court did not abuse its

broad discretion in making this award. Id. at 1941. The judgment of the district court is AFFIRMED.

ORDER DENYING REHEARING,
Nov. 16, 1983

No. 82-5154 &
82-5158

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LEONARD WEBB, Plaintiff-Appellant Cross-Appellee, vs. COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, et al., Defendants-Appellees Cross-Appellants.	)	ORDER FILED Nov. 16, 1983

Before: CURTIS and KRUPANSKY, Circuit Judges; and GUY, District Judge.

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT

s/ _____
Clerk

DECISION OF DISTRICT COURT,
Feb. 10, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LEONARD WEBB,	§	
	§	
Plaintiff,	§	
	§	
Vs.	§	
	§	NO. C-79-2574
DYER COUNTY BOARD OF EDUCATION	§	
OF DYER COUNTY, TENNESSEE,	§	
ET AL.,	§	
	§	
Defendants.	§	
	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW
ORDER ALLOWING ATTORNEY'S FEES AND COSTS

Plaintiff seeks payment of professional fees for legal services rendered to him by his counsel in administrative proceedings before the County Board of Education of Dyer County, Tennessee, and

for services rendered to him in the Federal District Court. Counsel for plaintiff claims that he is entitled to fees in the sum of $21,165.00 plus expenses of $561.61. Defendants argue that the fees requested by counsel are excessive and unreasonable. Defendants state that a reasonable fee for plaintiff is $5,000. Faced with such a vast difference in the fee suggested by distinguished counsel for both plaintiff and the defendants, the Court read all of the pleadings, supporting affidavits and briefs. In addition, the Court held an extensive evidentiary hearing.

This action was initially filed in this court by a former tenured school teacher employed by the Dyer County Board of Education. He alleged that he was unlawfully discharged because of his race. The parties resolved the case by consent. A consent order was filed on October 13,

1981, awarding the plaintiff $15,400.00 and equitable relief. Unable to resolve the matter relating to legal fees, plaintiff filed a petition for the awarding of legal fees and expenses by the Court.

Mr. Avon N. Williams of Nashville, Tennessee, plaintiff's counsel, claims that he is entitled to legal fees for services rendered to his client in administrative proceedings before the Board of Education of Dyer County, Tennessee, and for services rendered as counsel in the United States District Court. He claims, by way of affidavit, compensation for 141.1 hours. Mr. Williams asserts that the fair market value for his hourly services is $120.00 per hour across the board. He also claims entitlement to:

> An increment of 25% added in light of the peculiar difficulties involved in this particular kind of case and the unusual nature of the hours involved in the Board proceedings. (Williams affidavit, p. 10)

Apparently Board meetings were held at night and Mr. Williams traveled to Dyer County, Tennessee, from Nashville, Tennessee, to attend those Board meetings.

The defendants do not deny that plaintiff's counsel is entitled to reasonable fees and expenses. In fact, defendants assert that a reasonable fee is $5,000. Defendants base their primary challenge to an allowance of fees for the 82.8 hours for services rendered by counsel in the administrative proceedings before the Dyer County Board of Education. Defendants deny that plaintiff's counsel is entitled to include compensation for those hours in the district court proceedings:

> Defendants contend that while § 1988 authorizes the recovery of attorney's fees in an action brought to enforce rights and remedies secured by 42 U.S.C. § 1981, it does not authorize the award of attorney's fees where, as

> here, a plaintiff chooses to pursue state administrative remedies (herein hearings before the Dyer County Board of Education seeking reinstatement) where state administrative remedies are not required as a condition precedent to bringing the federal civil rights action. ("Response and Memorandum of Points and Authorities in Opposition to Plaintiff's Application for Award of Attorney's Fes.", p. 2)

In an action brought under 42 U.S.C. § 1981, the Court in its discretion may allow the prevailing party, pursuant to 42 U.S.C. § 1988, to recover a reasonable attorney's fee. Section 1988 of 42 U.S.C. provides, in relevant part:

> In any action or proceeding to enforce a provision of sections 1977, 1978,1979, 1980 and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The question for determination is whether the plaintiff is entitled to an award of counsel fees for those hours pertaining to the administrative proceedings before the Dyer County Board of Education where that proceeding was not a prerequisite to the filing of an action under 42 U.S.C. § 1981.

The plaintiff argues that New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) and Maher v. Gagne, 448 U.S. 122, 100 S.Ct. 2570 (1980), support the awarding of attorney fees for services rendered in state administrative proceedings. In Carey, supra, the Court was asked to decide whether a federal court had authority to grant the prevailing party attorney's fees under 706(k) of the 1964 Civil Rights Act (Title VII), for services performed in a state administrative proceeding that Title VII requires the claimant to invoke.

The plaintiff in Carey alleged that she had been refused employment because of her race. Upon receiving her complaint, the EEOC forwarded that complaint to the proper state agency for inquiry as required by § 706(c) of Title VII. While the state agency was considering the matter, the plaintiff received her right to sue letter from the EEOC and filed a Title VII action in Federal District Court. Subsequently, the state agency determined that the plaintiff had been deprived employment because of her race and ordered relief. Thereafter, the defendant agreed to comply with the state order, and both parties agreed to dismiss the Title VII action filed in District Court except for plaintiff's request for attorney's fees.

The Supreme Court ruled that § 706(k) of Title VII authorizes an award of attorney's fee for work performed in state administrative proceeding. The Court stated that Title VII's "scheme of interrelated and complimentary state and federal enforcement" procedures mandated initial resort to state and local remedies as a prerequisite to the filing of a Title VII action in District Court. The Supreme Court reasoned that state administrative proceedings were within Congress' contemplation as "proceedings" under 706(k) for which the federal court had authority to award attorney's fees. In the case before the Court the suit was brought and settled pursuant to § 1981. Thus, Carey is inapposite to the present case.

In Maher v. Gagne, Supra, the question before the Court was whether fees may be assessed against state officials after a case has been settled by the entry of a consent decree without any determination that the plaintiff's constitutional rights have been violated. 448 U.S. at 124. The Court decided that where the consent decree gave the plaintiff substantially the relief requested, the plaintiff is a prevailing party within the meaning of 42 U.S.C. § 1988 and entitled to attorney's fees. Accordingly, the Maher decision is of no significance to the case before the Court. In Maher there was no administrative proceeding or any fee request based upon an administrative hearing. The Court decided in Maher that fees were authorized for the Social Security Act claim because it was a type of §1983 claim recognized under § 1988. The Court

was merely following an earlier decision holding that § 1988 applied to all §1983 claims including those brought alleging violation of the Social Security Act. Maher does not support plaintiff's contention that fees may be awarded on the basis of a non-constitutional claim in all circumstances where the court does not decide the constitutional claim.

In Blow v. Lascaris, ___ F.Supp. ___, 50 U.S.L.W. 2178 (Oct. 29 1981), the district court was asked to decide whether an individual, who prevailed in state administrative proceedings to enforce a federal statutory right protected under 42 U.S.C. §1983, may thereafter bring an independent action in federal court under the Civil Rights Attorney's Fees Awards Act of 1976. Id. A mother had applied for a state grant of medical assistance to pay

emergency medical expenses incurred by her son. Initially, the agency denied assistance and the mother requested an administrative hearing. After the hearing,the state reversed its determination and granted assistance. The mother then filed an independent action in federal court seeking attorney's fees. The court denied the request for fees stating:

> This court, then, must be circumspect in interpreting § 1988 so as not to invade the province of Congress by expanding the statute beyond its intended scope. Moreover, the legislative history of § 1988 fails to support the mother's construction of the statute. It is devoid of any discussion of state or federal administrative proceedings. This court concludes that no cause of action exists under § 1988 for an attorney's fees award to prevailing parties in state administrative proceedings where recourse to federal court on the merits of the civil rights claim is not necessary or available. Id.

In another recent decision, Swain v. Secretary of Navy, ___ F.Supp. ____, 50 U.S.L.W. 2439 (Feb. 2, 1982), the District Court refused to grant an award of attorney's fees to the prevailing plaintiff for hours expended in administrative proceedings. The Court recognized that under the Age Discrimination in Employment Act (ADEA), resort to the administrative process is optional, and is not a prerequisite to filing suit in Federal District Court. Consequently,under such circumstances the prevailing party is not entitled to attorney's fees:

> [T]he ADEA does not include a provision requiring exhaustion of administrative remedies. Because resort to administrative procedures is merely an alternative option to the commencement of a judicial action for an age discrimination claimant, that claimant is not entitled to the expenses of counsel at the administrative level. Id.

The Court, based upon the foregoing analysis of the applicable law, rules plaintiff's counsel is not entitled to fees for the 82.8 hours pertaining to the administrative proceedings before the Dyer County Board of Education.

Although the defendants except to other hours claimed by plaintiff's counsel, the Court finds those exceptions to be substantially without merit.

Therefore, in compliance with Northcross v. Board of Education of the Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980), the Court must determine the number of hours of legal services performed by plaintiff's counsel, the normal hourly billing rate applicable, and whether the upward adjustment should be made and, if so, the amount thereof.

Plaintiff's counsel claims entitlement to compensation for 141.1 hours of legal services. The defendants have determined by their calculations that 82.5 hours claimed by plaintiff's counsel concerned matters pertaining to the administrative hearing. The Court finds no reason to disagree with that determination. Accordingly, counsel for plaintiff is entitled to compensation for the remaining 58.3 hours. Plaintiff's counsel is an able and highly respected attorney in the State of Tennessee and the United States. The Court finds, upon the entire record in this case, the fair market value of counsel's services is $125.00 per hour across the board or a fee of $7,287.50. The Court further finds, based upon the entire record in this case, that a contingency factor of 25% is reasonable. The charges by the Dyer County school officials

against the plaintiff, a tenured teacher, were serious charges. Initially, the school board fired plaintiff. His counsel timely requested a hearing before the school board as required by Tennessee law. That hearing was granted. The school board apparently held the case under advisement for about four years and then reaffirmed its initial decision to terminate plaintiff. There certainly was a strong element of contingency in this case. The adjustment factor of 25% added an additional $1,821.88 making plaintiff's counsel fees $9,109.38. The Court also finds the $361.61 itemization of expenses presented by plaintiff to be reasonable.

Plaintiff's counsel is also entitled to compensation for time related to litigating the fee issues before this Court. The

Court will allow plaintiff's counsel five (5) hours across the board or $625.00 for this time. In addition, plaintiff claims the costs of a plane trip for counsel from Nashville to Memphis to Nashville to be $146.00. Cost of rental car was $32.00. The Court finds these expenses to be reasonable and allowable.

It is therefore by the Court

ORDERED that plaintiff be and is hereby awarded counsel feels in the total sum of $9,734.38 plus expenses in the amount of $739.61.

ENTERED this 10th day of February, 1982.

S/
ODELL HORTON JUDGE
UNTIED STATES DISTRICT COURT

RESPONDENT'S

BRIEF

Office - Supreme Court, U.S.
FILED
MAR 14 1984
ALEXANDER L. STEVAS
CLERK

(2)

No. 83-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LEONARD WEBB,
Petitioner,

vs.

COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, *et al.*,
Respondents.

On Petition for Writ Of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this Court should exercise its discretion to review the decision below which is fully consistent with the decisions of this Court and of other federal appellate courts that have ruled upon the issue sought to be reviewed in closely analogous factual contexts?

LIST OF ALL PARTIES

Respondents to this petition not listed in the caption are Franklin Cobb, Jimmy Adams, Ernest Gullett, John H. Hooper, Terry W. Jones, Mary F. McCauley, Dr. William Pierce, Dan Tickle, Johnny Earl Vickers, Herman Reed, Dr. Dwight L. Hedge, Clayton Hayes, Bill Deere, Charles Maury, Harold Willis, A. W. Roody, Bobby Switzer, Jerry Muzzall, John Fisher, Alan Hines, Franklin Rhodes, C. J. Vinson, Helen Bell, Ira Powers, and Bobby Bowen. All respondents will be collectively referred to as County Board of Education of Dyer County, Tennessee.

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No. 83-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LEONARD WEBB,
Petitioner,

vs.

COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, *et al.*,
Respondents.

On Petition for Writ Of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

The County Board of Education of Dyer County, Tennessee, ("Board") respectfully prays that the instant Petition be denied. Review in this Court is inappropriate because the decision below is fully consistent with the decisions of this Court and of other federal appellate courts that have ruled upon the sole issue raised in the Petition in closely analogous circumstances.

STATEMENT OF THE CASE

The Board believes it is necessary to apprise the Court of the salient facts underlying the court of appeals decision. Petitioner Leonard Webb ("Webb") was discharged from his employment

as a teacher with the Board in 1974.[1] Commencing in April 1974, Webb was represented by counsel in hearings and proceedings before the Board concerning his dismissal.[2] These transpired over a four year period and resulted in the Board's affirmance on August 15, 1978 of its original action in dismissing Webb.[3]

Webb filed his nineteen page complaint in the district court on August 13, 1979.[4] The complaint was filed as a class action on behalf of Webb and all black teachers and students in the school system operated by the Board, claiming racial discrimination in various forms and violation of their due process rights.[5] In the more than two years that action was pending in the district court, Webb never sought or obtained certification of the suit as a class action.[6]

The Board filed two simple sets of interrogatories and requests for production of documents relating to Webb's employment and earnings subsequent to his termination in 1974, to which plaintiff responded.[7] Other than argument of the motion

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[1] Although Webb claims he was discharged "in the wake of the desegregation of the school in Dyer County, Tennessee," *see* Petition for Certiorari at 3, petitioner's complaint indicates that the previously segregated school system operated by the Board was abolished in or about the 1966-67 school year. Joint appendix, *Webb v. County Board of Education, Dyer County, Tennessee,* Nos. 82-5154 & 5158, at 16 (6th Cir.) [hereinafter cited as App.].

[2] App. at 77.

[3] *Id.* at 77-78.

[4] *Id* at 1, 8-27.

[5] *Id.* at 8-27.

[6] *Id.* at 1-7.

[7] *Id.* at 3-5.

for award of attorney's fees, only two appearances were made in the district court on behalf of Webb. An associate of Webb's counsel attended a status conference and a hearing on motions to dismiss filed by three individual defendants.[8] The record, including the district court docket sheet and the affidavit of Webb's counsel in support of fee application, demonstrates that no affirmative action by way of discovery or otherwise was taken by Webb's counsel to prosecute the action.[9]

Settlement negotiations were commenced by the Board's counsel in March, 1980, which ultimately lead to the entry of a consent order of dismissal on October 13, 1981.[10]

When counsel for Webb and the Board could not reach agreement on the amount of attorney's fees to which Webb was entitled, Webb filed a motion for award of counsel fees and expenses on November 13, 1981, which was supported by affidavit of Webb's counsel.[11] Following a hearing on Webb's motion, the district court, Horton, J., ruled that Webb was not entitled under 42 U.S.C. § 1988 to fees for legal services performed in administrative proceedings before the Board.[12] Judgment was entered for Webb awarding him attorney's fees in the amount of $9734.38, based upon an hourly rate of $125.00 for all services rendered in the district court, increased by a 25% upward adjustment, for an aggregate hourly rate of $156.25.[13] Webb

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[8] *Id.* at 4, 123.

[9] *Id.* at 1-7 & 47-57.

[10] *Id.* at 44. Under that consent order, the Board agreed to pay $15,400 damages and further consented to certain equitable relief. Although Webb contends that the district court somehow approved the settlement with the transcript of the state administrative proceedings before it as "evidence of the facts," the consent dismissal order of the district court indicates that no factual findings were made and that the order was entered upon consent of the parties. *Id.*

[11] App. at 46, 47-58.

[12] Appendix, Petition for Certiorari at 40a.

[13] *Id.* at 41a-43a.

appealed the judgment to the United States Court of Appeals for the Sixth Circuit.[14] On August 29, 1983, a unanimous panel of that court, Contie, Krupansky, and Guy, *JJ.*, affirmed the judgment of the district court in all respects.[15] The Sixth Circuit denied Webb's petition for rehearing and rehearing *en banc* on November 16, 1983.[16]

On February 14, 1984, Webb filed the instant Petition for Writ of Certiorari. The Petition asserts review is warranted because of a perceived conflict of the decision below with the decisions of this Court and with decisions of other federal courts of appeals.

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[14] App. at 94, 97. The Board filed a cross-appeal from the judgment claiming the fee award was excessive. *Id.* at 99.

[15] Appendix, Petition for Certiorari at 1a-25a.

[16] *Id.* at 26a.

REASONS FOR DENYING THE WRIT

I. The Decision Of The Court Of Appeals Is Fully In Accord With The Decisions Of This Court.

Petitioner argues[17] that the court of appeals decision in the instant case conflicts with this Court's decisions in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) and *Maine v. Thiboutot*, 448 U.S. 1 (1980). The decision below, however, is consistent with both *Carey* and *Thiboutot*, and is further consistent with the rationale of *Patsy v. Board of Regents*, 457 U.S. 496 (1982).

Carey, as the court of appeals noted, involved the issue of whether a litigant who prevails in state administrative proceedings required to be exhausted as a condition precedent to filing a Title VII claim is entitled to recover attorney's fees under 42 U.S.C. § 2000(e)-5(k). 447 U.S. at 56. Since this Court held in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), that there is no general requirement that administrative remedies be exhausted prior to instituting an action under 42 U.S.C. § 1983,[18] and since plaintiff concedes that the rationale of *Patsy* applies to 42 U.S.C. §§ 1981-86,[19] the instant case is clearly distinguishable from that presented to this Court in *Carey*.

Nor is the decision in the instant case inconsistent with *Thiboutot*. There, as petitioner concedes, the question before this Court, as it pertains to this case, was whether 42 U.S.C. §

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[17] Petition for Certiorari at 12-17.

[18] In *Patsy*, this Court observed that "there is serious disagreement over whether judicial or administrative procedures offer § 1983 plaintiffs the swiftest, least costly, and most reliable remedy." 457 U.S. at 513 n. 15.

[19] Petition for Certiorari at 14.

1988 authorizes the award of attorney's fees when a claim asserted pursuant to 42 U.S.C. § 1983 was brought in state court. This Court, construing the plain language of the statute, held that such an "action" was squarely within the terms of 42 U.S.C. § 1988. 448 U.S. at 9. In the instant case, the court of appeals correctly noted that neither statutory language, legislative history, nor policy reasons dictate that 42 U.S.C. § 1988 be applied to authorize attorney's fees for optional state administrative proceedings.[20] The holding of this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 270-71 (1975), therefore precludes an award of attorney's fees in the instant case.

II. The Court Of Appeals Decision Is Fully Consistent With Those Cases Decided By The Federal Courts Of Appeals In Closely Analogous Factual Contexts.

While petitioner claims that the decision of the court of appeals creates a conflict with prior decisions of the Seventh, Eighth, Ninth and District of Columbia Circuits,[21] the Board contends that the conflict is more apparent than real. One decision of the Seventh Circuit[22] and the District of Columbia Circuit decision[23] cited by petitioner were Title VII cases, and are distinguishable on that basis. The continued viability of the

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[20] Appendix Petition for Certiorari at 5a-21a.

[21] See Petition for Certiorari at 11.

[22] *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *cert. denied*, ____U.S.____, 77 L.Ed.2d 1315 (1983).

[23] *Kulkarni v. Alexander*, 662 F.2d 758 (D.C. Cir. 1978).

Eighth Circuit decision cited by petitioner,[24] is doubtful in light of that court's recent decision in *Horacek v. Thone*, 710 F.2d 496 (8th Cir. 1983).[25] The Ninth Circuit decision cited by petitioner,[26] as correctly noted by the court of appeals,[27] is distinguishable in that the § 1983 plaintiff was required to exhaust state administrative remedies pursuant to the *Pullman* abstention doctrine. Finally, the remaining Seventh Circuit decision upon which petitioner relies[28] is also distinguishable in that plaintiff in that case had initially brought an action under 42 U.S.C. § 1983 alleging violation of due process and equal protection in her termination by the municipal defendants.[29] Plaintiff was awarded a temporary restraining order by the district court granting her reinstatement "pending an administrative hearing and decision on the charges against her. . . ."[30] The state administrative proceedings in that case were contemplated as a part of the relief granted plaintiff by the federal court, a distinguishing factor not present in the instant case.

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[24] *Brown v. Barbke*, 588 F.2d 634 (8th Cir. 1978). In that case, plaintiff appealed from the district court's failure to award attorney's fees for all time spent in administrative proceedings. The issue on appeal was whether the district court erred "by failing to fully compensate [plaintiff] for time which her counsel spent in related proceedings before a state administrative agency and in state court." 588 F.2d at 635. Defendant apparently did not challenge either in the district court or on appeal the propriety of awarding fees for administrative proceedings. The Eighth Circuit affirmed the district court citing Title VII precedent.

[25] In that case the court of appeals held that an attorney who had represented a mentally retarded person in due process state administrative hearings was not entitled to attorney's fees under 42 U.S.C. § 1988.

[26] *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982).

[27] Appendix, Petition for Certiorari at 16a n. 4.

[28] *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982).

[29] 686 F.2d at 516.

[30] *Id.*

The Board contends that, upon analysis, there is no conflict among the federal courts of appeals on the precise issue decided in the instant case, and this Court should not exercise its discretion to grant the Petition for Certiorari.

III. The Decision Of The Court Of Appeals Is Consistent With Statutory Language And Congressional Purpose.

The court of appeals below held that neither the language of 42 U.S.C. § 1988 nor Congressional policy require an award of attorney's fees where a litigant chooses to pursue optional state administrative remedies prior to filing a civil rights claim under 42 U.S.C. § 1981 in federal court. This is consistent with the holdings of the First,[51] Second,[52] Third,[53] Fifth,[54] Eighth,[55] and Eleventh circuits.[56]

These holdings are in accord with the decisions of this Court in *Patsy v. Board of Regents*, 457 U.S. 496 (1982) that civil rights plaintiffs are not required to exhaust state administrative remedies prior to pursuing a federal civil rights claim such as the instant one in the federal courts.

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[51] *Venuti v. Riordan*, 702 F.2d 6, 9 (1st Cir. 1983).

[52] *Blow v. Lascaris*, 523 F. Supp. 913, 916 (N.D.N.Y. 1981), *aff'd*, 668 F.2d 670 (2d Cir.), *cert. denied* ____U.S.____, 74 L.Ed.2d 179 (1982).

[53] *Latino Project, Inc. v. City of Camden*, 701 F.2d 262, 264 (3rd Cir. 1983).

[54] *Redd v. Lambert*, 674 F.2d 1032, 1037 (5th Cir. 1982).

[55] *Horacek v. Thone*, 710 F.2d 496 (8th Cir. 1983). *See also Derheim v. Hennepin County Bureau of Social Services*, 524 F.Supp. 1321, 1324 (D. Minn. 1981), *aff'd on other grounds*, 688 F.2d 66 (8th Cir. 1982).

[56] *Estes v. Tuscaloosa County*, 696 F.2d 898, 901 (11th Cir. 1983).

The Board contends, therefore, that the decision below is fully consistent with the language and policies underlying 42 U.S.C. § 1988 and the civil rights statutes under which petitioner brought the instant action.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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PETITIONER'S

BRIEF

Office - Supreme Court, U.S.
FILED
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CLERK

No. 83-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LEONARD WEBB,

Petitioner,

v.

COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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Question Presented

The Court of Appeals for the Sixth Circuit held that the petitioner could not recover attorneys' fees under 42 U.S.C. § 1988 in a civil rights case for work done in an administrative proceeding that was not required to be exhausted as a condition to filing an action in federal court.

Are fees recoverable for work done in an available state forum when such work was reasonably expended as part of an attempt to vindicate petitioner's federal civil and constitutional rights?

PARTIES

Leonard Webb, petitioner.

County Board of Education of Dyer County, Tennessee, Franklin Cobb, Jimmy Adams, Ernest Gullett, John H. Hooper, Terry W. Jones, Mary F. McCauley, William Pierce, Dan Tickle, Johnny Earl Vickers,

Herman Reed, Dwight L. Hedge, Clayton Hayes, Bill Deere, Charles Massey, Harold Willis, A. W. Roody, Bobby Switzer, Jerry Mussall, John Fisher, Allen Hines, Franklin Rhodes, C.J. Vinson, Helen Bell, Ira Powers, Bobby Bowen, respondents.

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No. 83-1360

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Leonard Webb,

Petitioner,

v.

County Board of Education of Dyer County, Tennessee, et al.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 715 F.2d 254 and is set forth in the Appendix to the Petition for Writ of Certiorari (hereinafter cited as "P.A.") at

pages 1a-25a. The order of the Court of Appeals denying rehearing is unreported and is set forth in the Appendix at P.A. 26a-27a. The opinion of the District Court is unreported and is set forth at P.A. 28a-43a.

JURISDICTION

The judgment of the Court of Appeals affirming the decision of the District Court was entered on August 29, 1983. A timely petition for rehearing and for rehearing en banc was filed and was denied on November 16, 1983. The petition for a writ of certiorari was filed on February 14, 1984 and was granted on April 16, 1984. Jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves 28 U.S.C. § 1988, which provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, Title IX of Public Law 92-318 . . . or Title VI of the Civil Rights Act of 1964 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
>
> (R. S. § 722; Oct. 19, 1976, P. L. 94-559, § 2, 90 Stat. 2641.)

STATEMENT OF THE CASE

The present action was brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988 and 2000d. (J.A. 5-6.) The petitioner, Leonard Webb, was a tenured elementary school teacher who was discharged from his job in the Dyer County, Tennessee School System in 1974. The discharge was allegedly for "unprofessional conduct and insubordination" with no specification or further written charges.

After receiving the letter of dismissal petitioner hired counsel to repre-

sent him. A hearing before the Board of Education was requested, but was granted only after some delay. At the school board hearings one of the grounds for challenging the dismissal was that petitioner's rights under the Fourteenth Amendment to the Constitution of the United States had been violated. 1/ In addition to challenging the procedures under which he was discharged as violating due process, at the hearings counsel elicited testimony indicating that racial discrimination may have been a factor in petitioner's discharge. Specifically, it was alleged that the discharge was precipitated by complaints from white parents concerning petitioner's

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1/ The transcript of the school board hearing is attached to the affidavit of Avon Williams (J.A. 30) which is item 73 of the Record. Citations here and in n.3, infra, are to the pages of the transcript of the Board hearings. The Fourteenth Amendment is referred to at pages 2, 4-5, 9, and 60 of the transcript.

disciplining of their children. 2/

In August, 1978, the board issued a final decision upholding the decision to terminate petitioner. Petitioner then filed the present action in federal court challenging his discharge on both equal protection and due process grounds. (J.A. 5-20.) The defendants filed motions to dismiss and/or for summary judgment. (J.A. 21-29.) In opposition to those motions, respondent filed the transcript of the proceedings before the school board (J.A. 30.) The transcript, which was in excess of 200 pages (R. 73 et seq.), contains

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2/ In prior years the schools in Dyer County, Tennessee had been segregated. Petitioner had been employed for many years in the previous all-black school with no complaints. He was one of the first black teachers transferred to a previously all-white school. There was evidence adduced at the school board hearings that complaints of white parents were racially motivated. (See n. 3, infra.)

extensive examination and cross-examination of witnesses. The ostensible reasons for petitioner's discharge were explored at length, as were his defenses. 1/

1/ The transcript of the hearing before the board (R. Item 73) contains testimony regarding the following matters:

The Dyer County public schools remained racially segregated until the late '60s. (Board Hearing Transcript at 11.) All the principals are white. (Id. at 205.) Webb was hired in 1962 and taught in segregated black schools without incident until 1969. (Id. at 10-12, 180, 190, 210.) In 1969, Webb was the first black teacher assigned to Finley Elementary, a 90% white school. (Id. at 99.) At the end of the 1972-73 school year, Webb was reprimanded for paddling a white girl and ordered not to paddle any students or to send them to the principal's office. (Id. at 16.) Webb thereafter had difficulty maintaining discipline in his classes. (Id. at 20.)

In the 1973-74 school year, Webb transferred to Newbern Elementary as a "Practical Arts" teacher. (Id. at 20.) He was the only black male teacher and one of four black teachers out of 28. (Id. at 190.) White students and parents complained about Webb's disciplinary measures. (Id. at 78 79, 162.)

While the motions were pending the parties settled the merits of the case. Respondent received damages in the amount of $15,400 and a decree was entered ordering the Board to treat him as having resigned and to place no disparaging remarks in his professional record. (J.A. 32-34.)

1/ (Continued)

Paddling was an accepted disciplinary sanction in the Dyer County schools and used by most of the teachers (id. 72, 99, 102, 113, 118); teachers and administrators believed paddling was necessary to maintain discipline (id. at 100, 102); there were no written guidelines for use of paddling (id. at 122-23, 126); Webb, in the opinion of numerous teachers, administrators and students who testified, did not paddle students too harshly (id. at 72-73, 78, 81, 86, 113, 119, 124, 126); Webb was the only teacher to sometimes use physical exercise as a more enlightened alternative to paddling (id. at 106-107, 109-111); no other teacher had ever been reprimanded for paddling students or ordered not to paddle until Webb (id. at 74, 150, 151); Webb disciplined both black and white students in the same way (id. at 78,

After the district court accepted the settlement, the parties attempted to settle the question of attorneys' fees. Although the parties agreed that petitioner was the prevailing party, they were unable to agree on the amount of fees. Petitioner then filed a motion for fees in the district court which sought compensation for all the time spent representing petitioner, including the work done before the school board. (J.A. 35; 39-47.) The respondents opposed any fees for this work. (R. Item 87; J.A. 57-72.)

3/ continued

83); some white students did not respect Webb as a teacher (id. at 78, 79); and the administration made no efforts to assist Webb or black teachers in maintaining discipline with white students in the wake of integration (id. at 161-62, 208, see 66, 159-60, 176-77). No other teacher had ever been dismissed by the board for paddling. (Id. at 86, 113, 123, 126.)

The district court held a hearing on the fees issue, at which two experienced attorneys testified in support of petitioner's request.4/ They both addressed the

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3/ continued

Webb was given no support by administrators when white parents complained to them about discipline. (Id. at 29-30, 162.)

Webb was accused of improperly restraining a student who was later suspended by the board for the incident. (Id. at 224-25.) Newbern's principal assisted a white student whom Webb ordered to stand in the hall without consulting Webb beforehand. (Id. at 19.) The Newbern principal admitted that the Practical Arts course that Webb was assigned to teach lacked adequate equipment, supplies or structure for students, and that he did not know how Webb could teach the class under those conditions. (Id. at 216-22.)

Objections were made to, inter alia, inadequate notice, failure to provide a prior hearing, errors in assigning burden of proof, bias, and failure to subpoena witnesses and Webb's dismissal pending completion of hearing. (Id. at 1-9, 60, 88-90, 92-97, 136.)

4/ The transcript of the hearing is Item 99 in the record, and is cited here as Fee Hearing Tr.

question of inclusion of the time spent in connection with the administrative process. The attorneys expressed the opinion that this time was analogous to discovery or pre-complaint investigation that would have to be done in any case. (Fee Hearing Tr. at 11, 13-17; 40-41.)[5/] They also noted that awarding fees would encourage the use of an alternative and less expensive forum than the federal courts. (Id.

5/ As one witness noted:

> Facts are discovered, positions taken, parties respond whether it is by one demand letter or a demand for a hearing, which is then held, and the parties state their positions regardless of the result, that is, part of the factual basis for the complaint and ultimately for the trial. So one could safely make the statement that at least a substantial part of that ground would not have to be plowed in actually litigating the case.

Id. at 14.

at 14-15; 41).[6/]

In its order, the district court awarded fees only for the work performed following the filing of the complaint in federal court. It specifically held that fees could not be awarded for the time spent in the state administrative proceedings before the school board. (P.A. 40a.) The stated ground was that there was no authority for such an award under 42 U.S.C. § 1988 because there was no requirement that state administrative remedies be exhausted as a condition to filing an action in federal court. (P.A. 38a-39a). Petitioner appealed and the decision of the district court was upheld by a panel of the

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6/ It was pointed out that, "The Chief Justice of the United States Supreme Court leans heavily on the side of trying to resolve issues wherever they can in the least expensive forum possible." (Id. at 14).

Sixth Circuit. (P.A. 25a.) That court agreed that § 1988 did not authorize the award of fees for work done in a state administrative body since there was no requirement that administrative remedies be exhausted before filing under Sections 1981 et seq. (P. A. 9a-11a). A petition for rehearing and a suggestion for rehearing en banc were denied (P.A. 26a-27a). On April 16, 1984, this Court granted a petition for writ of certiorari to review the decision of the court below.

SUMMARY OF ARGUMENT

I.

A. The Civil Rights Attorney's Fees Act provides that "reasonable" attorney's fees are to be awarded to the prevailing party. This Court, in Hensley v. Eckerhart, ___U.S. ___, 76 L.Ed.2d 40, 50 (1983), has held that fees are to be awarded for all

time "reasonably expended." The record in this case establishes that the time spent by petitioner's counsel pursuing relief in an available state administrative forum prior to filing in Federal court was reasonably expended. Therefore, fees were recoverable for the time spent by counsel in that forum.

B. The statute provides that fees are awardable for work done in any "action or proceeding" brought to enforce the civil and constitutional rights protected by 42 U.S.C. §§ 1981-1986. To interpret the phrase "action or proceeding" as excluding a state administrative proceeding would render the words "or proceeding" nugatory. Such a result would be contrary to this Court's decision in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).

II.

The legislative history of the Civil Rights Attorney's Fees Act clearly supports the award of fees here. The purpose of the Act is to encourage the involvement of attorneys in the enforcement of federal civil rights. The denial of fees for work related to such enforcement would undermine Congressional intent.

ARGUMENT

I.

THE LANGUAGE OF THE FEES ACT CLEARLY AUTHORIZES AN AWARD OF FEES FOR THE WORK DONE IN THE STATE ADMINISTRATIVE PROCEEDING IN THIS CASE.

A. The Work Done Before The School Board Was Time "Reasonably Expended" In Seeking The Enforcement Of Federal Civil Rights.

The Civil Rights Attorney's Fees Act of 1976 (42 U.S.C. § 1988) provides for the award of a "reasonable" attorney's fee to a prevailing party in an action or proceeding

to enforce a provision of a variety of federal civil rights statutes. In Hensley v. Eckerhart, ___ U.S. ___, 76 L.Ed. 2d 40 (1983) this Court interpreted this language to require an award of fees for all work "reasonably" done to enforce the rights guaranteed by §§ 1981, et seq. Here, plaintiff was the prevailing party in a federal court action brought to enforce those rights. If, therefore, recourse to an available state administrative process was time reasonably spent, then Hensley requires that that time be compensated.

The record in this case fully supports the conclusion that the time spent prior to filing in federal court was indeed reasonable. As pointed out at the hearing on attorneys' fees by the attorney-experts called by plaintiff, the work at the administrative hearings, at which witnesses testified and were cross-examined, was

essentially similar to the taking of depositions or the conduct of other discovery that would be necessary to prepare for trial. 7/ Moreover, the work was analogous to the investigation into the facts behind a case that would be done by any competent attorney to prepare to file a complaint in court. 8/ Certainly such time, whether in the form of pre-complaint investigation or post-complaint discovery, would be compensable under any standard of reasonableness.

The respondent did not dispute this contention below; nor did the district court hold that the time was not reasonably expended. Rather, the basis of its deci-

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7/ Fee Hearing Tr. 13-14.

8/ Id. Revised Rule 11, F.R. Civ. Proc., requires an attorney to certify that the complaint is "well grounded in fact" based on his "reasonable inquiry."

sion was solely that as a matter of law it was not compensable under § 1988.

The reasonableness of the expenditure of time in the administrative proceedings was fully demonstrated by the fact that plaintiffs' attorney was able to use the fruits of that labor to respond to defendants' motions for summary judgment. Under the federal rules, of course, depositions and other products of discovery may be used either to support or defeat a motion for summary judgment. 9/ If plaintiff had retaken the testimony developed at the hearings in the form of depositions of the same witnesses, and had relied on those depositions to respond to the motion for summary judgment, there would be no question but that that time would have been

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9/ Rule 56(e), F.R. Civ. Proc.

compensable, unless respondents argued that it was not "reasonable" for plaintiffs' attorney to spend time replicating already available evidence. Of course, no policy would be served whatsoever either by requiring duplication, or by presenting plaintiffs' counsel with the dilemma of not doing discovery and facing the argument that work done administratively was not compensible, or doing discovery and facing the argument that duplicative work was not reasonable.

Further, the work done in the administrative work was directly related to the enforcement of petitioner's civil rights because of its presumptive effect on the settlement process. Again, the favorable settlement of a case is often advanced by discovery or other fact-development. In this case, petitioner received relief substantial enough so that respondents

agreed that he was the prevailing party for the purpose of receiving fees. (R. Item 87.) In the absence of any contrary showing by respondents, the time spent developing the factual record was therefore reasonably related to the vindication of petitioner's rights and hence reimbursible.

In sum, Hensley requires that fees for work done from the onset of an attorney-client relationship be awarded if that work was reasonably related to the enforcement of federal civil rights unless the hours spent would not, in the exercise of normal billing judgment, be "properly billed to one's client." 76 L.Ed.2d at 51, quoting Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc). It cannot be seriously questioned but that representation before an administrative board empowered to grant relief prior to filing

in federal court would be billable hours.[10/] Therefore, an award of fees was clearly authorized by § 1988.

B. Fees Are Recoverable Under This Court's Decision In New York Gaslight Club v. Carey.

In part I.A. above we have demonstrated that fees are recoverable because they are sought by a prevailing party in an action brought in federal court for legal work reasonably related to the enforcement of federal civil rights. Fees are also recoverable because the work was done in "a

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10/ The Tennessee Teacher Tenure Law (TCA 49-5-501, et seq., and particularly §§ 49-5-511 and 49-5-512, grants substantive rights as well as the administrative proceeding to enforce those rights. The texts of §§ 49-5-511 and 49-5-512 are set out in the appendix hereto (B.A.) for the Court's convenience. The Tennessee law specifically provides that a teacher challenging dismissal has the right to be represented by counsel before a local school board (§ 49-5-512; B.A. p. 3a). See New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 69-70 (1980).

proceeding" within the meaning of the Fees Act.

Section 1988 directly tracks the language of the parallel counsel fees provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k).[11/] Both sections provide that reasonable counsel fees may be awarded for work done "in any action or proceeding" to enforce the substantive rights protected by the respective statutes. In New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), this Court held that the language of Title VII's fee provision encompasses not only court actions but also state and federal administrative proceedings. Therefore, fees were awardable for work

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11/ See New York Gaslight Club, Inc. v. Carey, 447 U.S. at 70, n. 9; S. Rep. No. 94-1011 (94th Cong. 2d Sess., 1976), p. 2.

done in those administrative proceedings.

Of course, the legislative history of § 1988 makes it clear that Congress intended that Title VII fee case law would govern the interpretation of the 1976 Act.[12/] This Court so held in Carey, 447 U.S. at 70, n. 9, when it looked to the legislative history of § 1988 in interpreting the antecedent Title VII provision, and in Hensley, 76 L.Ed. at 48 and Blum v. Stenson, ___U.S. ___, 79 L.Ed.2d 891, 898-99 (1984), when it relied on Title VII decisions to interpret § 1988.

The court below distinguished Carey on the ground the state administrative proceedings at issue there were required by

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12/ See S. Rep. 94-1011 (94th Cong. 2nd Sess. 1976) at p. 6, and H. Rep. 94-1558 (94th Cong. 2d Sess., 1976) p. 8, citing Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) and other Title VII cases as establishing the standards governing the award of fees.

Title VII to be exhausted as a condition for filing an action in federal court. On the other hand, there is no exhaustion requirement as a precondition for filing actions under §§ 1981-1983.[13/] The decision below, however, overlooked the fact that if Section 1988 is read in this limited way, the phrase "or proceeding" will have no meaning.

As was pointed out in Carey the word "action" encompasses all court proceedings. Therefore, to read the phrase "action or proceeding" to include only court proceedings would effectively read the words "or proceeding" out of the statute. 447 U.S. at 61. The Court further noted that Congress clearly had in mind something other than court actions when it used the

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13/ Patsy v. Florida Bd. of Regents, 457

statutes. See Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982). However, this fact simply re-enforces the conclusion that to read the phrase "action or proceeding" as only encompassing an action in federal court would render the term "or proceeding" meaningless, since under no circumstances would there be any proceeding other than a judicial action that must be filed in order to enforce the rights guaranteed by §§ 1981, et seq. Of course, it is axiomatic that statutes should be read, whenever possible, to give effect to all of their parts. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); Administrator, F.A.A. v. Robertson, 422 U.S. 255, 261 (1975); Weinberger v. Hyson, Westcott & Dunning, 412 U.S. 609, 633 (1973). Moreover, terms connected by a disjunctive should be given separate meaning. Reiter v. Sonotone, supra at 339.

phrase "action or proceeding" because in the counsel fee provision of Title II of the 1964 Act fees were limited to work done in an "action". Ibid.[14/] It is true that there is no requirement that state administrative proceedings [15/] be exhausted as a condition to filing an action in federal court under the Reconstruction Civil Rights

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14/ Compare Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters & Joiners of America, 456 U.S. 717 (1982) (fees not provided for in statute) and Becker v. Lehigh Valley R. Co., 236 U.S. 412, 432-33 (1915) (statute provides only for fees connected with civil action in court and not for "proceedings anterior to the action"), with Winton v. Amos, 255 U.S. 373 (1921) (fees awardable for representation before Congress where statute authorized fees broadly "for services rendered.")

15/ Under Tennessee law (TCA 49-5-501, et seq.) a teacher has a property right in the employment contract and termination of the contract must be accompanied by due process. Cf. Kendall v. Board of Education, 627 F.2d 4 (6th Cir. 1980). Thus, the hearing before the Board was clearly a "proceeding" to enforce contract rights covered under 42 U.S.C. § 1981.

Further, the facts of Carey, and the cases it cited with approval, show it is not limited to holding that fees can only be obtained for work that must be done as a precondition to filing in federal court. Title VII does not require that either state or federal administrative proceedings be pursued until there is a decision. Rather, an administrative proceeding need only be commenced and followed in good faith for a limited period of time. The plaintiff then has an absolute right to file an action in federal court, whether he or she is a private or state and local government employee who must file with the Equal Employment Opportunity Commission, or a federal employee who must pursue internal agency

EEO procedures. 16/

In Carey, as well as in the various cases it cited, the plaintiffs, however, did much more than simply file administrative complaints and wait for the required period of time. Rather, they stayed in the administrative process and pursued that remedy to final decision.17/ Nevertheless, they were entitled to fees for all the time spent and not simply for the time required to be spent. This result flowed from the underlying rationale for Carey that it furthered sound policy to encourage the use of optional available remedies to seek the vindication of statutory and constitutional rights, and thereby to avoid the

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16/ See 42 U.S.C. §§ 2000e-5(f) and 2000e-16 (employees have the right to sue after 180 days have expired).

17/ See, e.g., Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977); Johnson v. United States, 554 F.2d 632 (4th Cir. 1977).

unnecessary burdening of the courts. 447 U.S. at 63, 65 n. 6.

Similarly, although state administrative remedies need not be pursued as a condition to filing under any of the statutes listed in § 1988, sound policy led Congress to encourage the use of alternative remedies, whatever they might be, that were available to vindicate the substantive rights. Since both the language of the statute and the policy considerations to be served are identical in this case as in Carey, there is no reason why the rule of Carey should not govern. 18/

18/ Moreover, the ruling that fees are available under § 1988 only for legal work done in connection with or as a required precondition for an action brought in federal court is fundamentally inconsistent with this Court's decision in Maine v. Thiboutot, 448 U.S. 1 (1980). There, this court held that fees were recoverable in a state court "action" brought to enforce rights protected by § 1983. It necessarily

II.

THE AWARD OF FEES FOR STATE ADMINISTRATIVE WORK IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF § 1988

We have shown above that the clear language of the statute authorizes fees to petitioner for time spent pursuing state administrative remedies, since such time was "reasonably expended". Although it is not necessary to look beyond the statute's words, 19/ the legislative history of 42 U.S.C. § 1988 supports the conclusion that Congress intended that fees be available for legal services for the enforcement of

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18/ continued

rejected the principle that fees were limited to federal court actions, and it follows that the plain meaning of the statute also encompasses a state administrative "proceeding" brought to enforce the same statute.

19/ Maine v. Thiboutot, 448 U.S. at 6, n.4.

civil rights regardless of the forum involved. Thus, the specific example of Shelley v. Kraemer, 334 U.S. 1 (1948), a state court proceeding in which a defendant was in the posture of enforcing civil rights, was given.[20/] See also, Maine v. Thiboutot, 448 U.S. 1 (1980), holding that fees were availble under § 1988 in state court.

The theme of the legislative history is consistently that representation by counsel was essential to enforce and protect civil rights.[21/] Such representation could only be secured by providing for the compensation of attorneys.[22/] Indeed, a

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20/ S. Rep. 94-1011 (94th Cong. 2d Sess., 1976), p. 4, n.4.

21/ See, e.g., S. Rep. 94-1011, p. 2; 122 Cong. Rec. S. 16252 (daily ed., Sept. 21, 1976); 122 Cong. Rec. H 12165 (daily ed., Oct. 1, 1976).

22/ See, e.g., H. Rep. 94-1558 at p. 3.

central purpose of the statute was to provide for fees for work done pursuing remedies alternative to Title VII and other statutes.[23/] Thus, it would be wholly anomalous to hold that Congress intended to discourage the pursuit of any remedy by which the underlying rights might be vindicated.

The denial of fees to petitioner would be particularly anomalous because of Congress' concern with the imbalance of resources between individuals who have claimed that their constitutional rights have been violated and governmental agencies that use public funds to defend against those claims.[24/] Here, petitioner

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23/ H. Rep. 94-1558 at p. 4.

24/ See, e.g., S. Rep. 94-1011, p. 5; H. Rep. 94-1558, p. 7. See also, The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcom. on

was required to retain counsel while the respondent board used public funds to defend its actions at both the school board hearings and in court. To require individuals to bear the costs of their own representation if they pursue available state remedies would continue precisely the type of inequity Congress wished to end and would encourage an aggrieved person to file in federal court as soon as possible. Such a result would both be contrary to the Congressional purpose and against sound public policy.[25/]

24/ continued

Representation of Citizen Interests, Committee of the Judiciary, U.S. Senate, 93rd Cong., 1st Sess. at 857; Awarding of Attorneys' Fees, hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, 94th Cong., 1st Sess. at 61; 79; 89-90 (1975).

25/ See Maine v. Thiboutot, 448 U.S. at 11, n.12.

CONCLUSION

For the foregoing reasons the decision below should be reversed.

Respectfully submitted,

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APPENDIX

Excerpts From the Tennessee Teacher Tenure Law

SECTIONS 49-5-511 AND 49-5-512, TENNESSEE CODE ANNOTATED (TENNESSEE TEACHER TENURE LAW)

49-5-511. Dismissal or suspension of teachers generally.

-- (a)(1) No teacher shall be dismissed or suspended except as provided in this part.

(2) The causes for which a teacher may be dismissed are as follows: incompetence, inefficiency, neglect of duty, unprofessional conduct, and insubordination, as defined in § 49-5-501.

(3) A superintendent may suspend a teacher at any time that may seem necessary, pending investigation or final disposition of a case before the board or an appeal, provided that if the teacher is vindicated or reinstated, he shall be paid the full salary for the period during which he was suspended.

(4) When charges are made to the board of education against a teacher, charging the teacher with offenses which would justify dismissal of the teacher under the terms of this part, the charges shall be made in writing, specifically stating the offenses which are charged, and shall be signed by the party or parties making the charges.

(5) If in the opinion of the board, charges are of such nature as to warrant the dismissal of the teacher, the superintendent shall give the teacher a written notice of this decision, together with a

copy of the charges against him, and a copy of a form which shall be provided by the state commissioner of education advising the teacher as to his legal duties, rights, and recourse under the terms of this part.

(b)(1) When it becomes necessary to reduce the number of teaching positions in the system because of a decrease in enrollment or for other good reasons, the board shall be empowered to dismiss such teachers as may be necessary.

(2) The board shall give the teacher written notice of dismissal explaining fully the circumstances or conditions making the dismissal necessary.

(3) A tenure teacher who has been dismissed because of abolition of position shall be placed on a preferred list for re-employment in the first vacancy he is qualified by training and experience to fill, provided, however, nothing in this sub-section shall be construed to deprive the board of the power to determine the fitness of such teacher for reemployment in such vacancy on the basis of the board's evaluation of such teacher's competence, compatibility, and suitability to properly discharge the duties required in such vacancy considered in the light of the best interest of the students in the school where the vacancy exists. [Acts 1951, ch. 94, §§ 2, 6, 7, 15 (Williams, §§ 2345.2, 2345.6, 2345.7, 2345.15); 1955, ch. 343, § 2; T.C.A. (orig. ed.), §§ 49-1410, 49-1412-49-1415.]

49-5-512. Dismissal or suspension -- Hearing. -- A teacher, having received notice of charges against him, may within thirty (30) days after receipt of notice, demand a hearing before the board, as follows:

(1) The teacher shall give written notice to the superintendent of his request for a hearing.

(2) The superintendent shall within five (5) days after receipt of request, indicate the place of such hearing and set a convenient date, which date shall not be later than thirty (30) days following receipt of notice demanding a hearing.

(3) The teacher may appear at the hearing and plead his cause in person or by counsel.

(4) The teacher may present witnesses, and shall have full opportunity to present his contentions and to support them with evidence and argument.

(5) The chairman of the board conducting the hearing is hereby empowered to issue subpoena for witnesses to compel their attendance at hearings authorized under this section. All parties to the proceeding shall have the right to have subpoenas issued by the chairman of the board to compel the attendance of all witnesses deemed by such parties to be necessary, for a full and complete hearing. All witnesses shall be entitled to the witness fees and mileage provided by law

for legal witnesses, which fees and mileage shall be paid as a part of the costs of such proceeding. The costs of such proceeding shall be paid by the losing party.

(6) The chairman of the board shall administer oaths to witnesses, who shall testify under oath.

(7) On request of either party to the trial witnesses may be barred from the hearing except as they are called to testify. The hearing may be private at the request of the teacher or in the discretion of the board.

(8) The board shall within ten (10) days decide what disposition to make of the case and shall immediately thereafter give the teacher written notice of its findings and decision.

(9) The superintendent or other school officials shall not be held liable, personally or officially, when performing their duties in prosecuting charges against any teacher or teachers under this part. [Acts 1951, ch. 76, § 16 (Williams, § 2345.16); Acts 1972 (Adj. S.), ch. 588, § 1; T.C.A. (orig. ed.), § 49-1416.]

JOINT

APPENDIX

Office - Supreme Court, U.S.
FILED
JUN 8 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1560

In the

Supreme Court of the United States

October Term, 1983

Leonard Webb,

Petitioner,

v.

County Board of Education of Dyer County, Tennessee, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 14, 1984
CERTIORARI GRANTED APRIL 16, 1984

BEST AVAILABLE COPY

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IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LEONARD WEBB,

Plaintiff,

vs

COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, a public body corporate, et al.,

Defendants.

RELEVANT DOCKET ENTRIES

8-13-79	2.	Complaint
8-13-79	3.	Amended Complaint
9-2-79	44.	Answer
10-11-79	50.	Motion to Dismiss/or Summary Judgment
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1-30-81	63.	Affidavit of Avon N. Williams, Jr., Counsel for plaintiff, attaching transcript
10-14-81	79.	Consent order of Dismissal (all matters relating to fees of counsel for

plaintiff are are expressly expressly reserved for resolution by agreement of the parties, or, in the absence of agreement, by the Court)

11-13-81	80.	Motion for Award of Counsel Fees and Expenses
11-13-81	81.	Affidavit of Avon N. Williams, Esq.
11-13-81	82.	Affidavit of Avon N. Williams, Esq., in regard to Expenses
12-13-81	87.	Response and Memorandum of Points and Authorities in Opposition to Plaintiff's Application for Award of Attorney's Fees
12-14-81	88.	Supplemental Affidavit In Support of Defendant's Response in Opposition To Plaintiff's Motion for Award of Counsel Fees and Expenses -- Affidavit of Allen S. Blair
2-12-82	91.	Findings of Fact and Conclusions of Law, Order Allowing Attorney's Fees and Costs
2-18-82	92.	Judgment on Decision By the Court

3-9-82	94.	Notice of Appeal
4-20-82	99.	Transcript (hearing on 12/18/81)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

****
[Caption Omitted]
****

Complaint

I

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C., Sections 1331 and 1343, this being a suit wherein the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interests and costs, arising under the Constitution and laws of the United States, and this being a suit in equity authorized by law, 42 U.S.C. Section 1983, to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation under color of statute, ordinance,

regulation, custom or usage of a State of rights, privileges and immunities secured by the Constitution and laws of the United States; and to recover damages and other relief under the provisions of said 42 U.S.C., Section 1343. The privileges, rights and immunities sought to be secured by this action, are rights, privileges and immunities secured by the due process and equal protection clauses of the fourteenth Amendment to the Constitution of the United States and by 42 U.S.C., Sections 1981, 1985, 1986, 1988 and 2000d, as hereinafter more fully appears. Pendent jurisdiction over state law questions is invoked.

...

VIII

Plaintiff is a 1958 graduate of Tennessee State University holding a BS Degree; he also holds a State Professional Teaching Certificate from the State of Tennessee in

Industrial Arts Education and Elementary Education and in addition a Master of Science Degree in Guidance and Counseling from Tennessee State University received about _____, 19__. Plaintiff was employed by defendant School System in 1962 as an Elementary School Teacher in black schools and worked in that capacity until 1969 when he was reassigned to the formerly white Finley Elementary School as a part of said desegregation process initiated by defendants mentioned hereinabove. In the 1972-73 School Year, during plaintiff's latter teaching assignment the defendants, Cecil J. Vinson, Helen Bell and Ira Powers, became Dyer County Superintendent, Supervisor of Schools, and Principal of Finley School respectively. Following an event toward the end of that year wherein defendant Bell observed plaintiff administering discipline upon a white female student by

paddling (a form of discipline accepted throughout the Dyer County School System) the defendants Bell, Powers and Vinson, formed a conspiracy for the purpose of removing and with the intention of removing plaintiff as a teacher in the School System. As a part of and in pursuance of said conspiracy defendants, Powers and Bell, uttered, wrote and published false allegations against the plaintiff to the effect that he was administering abnormal punishments to students and was not rendering satisfactory service as a teacher. Said conspirators effectuated the transfer of the plaintiff from Finely Elementary School to Newbern Elementary School wherein defendant, Bobby Bowen, was Principal and who joined in said conspiracy thereafter in the 1973-74 School Year by denying plaintiff a respectable teaching assignment, adequate or [sic] classroom equipment and continuing along

with defendants Bell and Vinson in the making of false allegations reflecting adversely upon plaintiff's teaching ability, claiming that he administered abnormal punishment to students, soliciting complaints from white parents and students regarding such alleged claims of abnormal student punishment and denying plaintiff the forms of administrative support in dealing with student discipline problems ordinarily accorded to white teachers similarly situated. Pursuant to said conspiracy Bell, Powers and Bowen, either gratuitously or at the solicitation of defendant Vinson, wrote letters to said defendant Vinson in January 1974 falsely charging plaintiff with abnormal student discipline,inability to command the respect of his students and unsatisfactory service as a teacher. On information and belief, defendant Vinson then conveyed these false allegations to the

defendant Board and on 25 March 1974 defendant Vinson suspended plaintiff "pending investigation and disposition of your case by the Board of Education". Thereafter the defendant Board on the basis of said false allegations and charges of said individual defendants in conspiracy with each other, summarily discharged plaintiff without any opportunity for hearing, confrontation by his accusers or defense. A copy of said letter of suspension dated 25 March 1974 and said letter of dismissal dated 10 April 1974 are attached hereto marked Exhibit "A" and "B" respectively to this Complaint and made a part hereof by reference as fully and effectively as if copied herein verbatim. Plaintiff avers that said allegations of the defendants Vinson, Bell, Powers and Bowen made against him pursuant to said conspiracy among them and on the basis of which the

defendant Board discharged him were false, defamatory and deliberately made and designed to procure the discharge of plaintiff solely because he is a black person and because of the hostility and racial prejudiced attitudes of said white administrators and teachers who conspired to make said false and defamatory allegations and charges against the plaintiff solely because he was a black person and because of their adverse response and the adverse response solicited by them from white parents and school children to the legitimate activities of the plaintiff in disciplining white students in the course of his teaching duties. Following said discriminatory discharge plaintiff appealed to the defendant Board and demanded a hearing pursuant to State Law (T.C.A., Section 49-1414, et seq.) Defendants failed and refused to afford plaintiff a fair hearing

or to furnish plaintiff or his counsel specific written notice of the charges as required by State law, refused to require said conspirator staff members or the alleged white school children and parents whom they had solicited, to appear before the Board and carry the burden of presenting proof in support of plaintiff's discharge with right of cross examination by plaintiff's counsel, refused in some instances to subpoena witnesses requested by the plaintiff, and delayed the hearing of the plaintiff's case for a period of five years, finally rendering a decision on 15 August 1978 upholding his discharge, solely because of his race (black).

IX

The refusal of defendant public school officials on account of race and color to hire, retain, recruit, employ, transfer,

promote and/or assign black principals, teachers, supervisors, to assign said administrative or teaching personnel in or to white or formerly white schools on a regular basis with full status, responsibility and support by said public school officals and the willingness to accept and act upon said unsubstantiated, unfounded and false complaints of defendant white school administrators or teachers or white school children and patrons solicited or encouraged by said white administrators or teachers and the discharge of the plaintiff without a full and fair hearing on the basis of said vague, false and unsubstantiated complaints of white school administrators, teachers, school students, personnel, patrons or other community agencies, the refusal to employ and assign both black and white principals, teachers and staff personnel throughout the defendant School System in substantial and

equitable numbers in relation to the respective numbers of students in school population or of black persons in the community population; the refusal to employ and recruit new black principals, teachers or members of the central staff and the manipulation of school principal and teaching assignments to eliminate black principals and teachers, retains a substantial aspect of racial segregation and discrimination in the schools which prevents the Dyer County School system from ever having been desegregated and prevents the black children attending schools in Dyer County from obtaining a racially integrated and nondiscriminatory education. Said racially discriminatory School system and said actions of the defendants, including plaintff's discharge in the foregoing circumstances in accepting and yielding to vague, unsubstantiated, false, unfounded and

racially motivated complaints by said defendant white administrators and teachers and other white personnel, students, school patrons or community agencies against the plaintiff and other black teachers as a basis for discriminatory and punitive action without notice and opportunity for hearing and also said actions of defendants in hiring or refusing to hire, rehiring, promoting, demoting, assigning, reassinging, transferring or retransferring or discharging principals, teachers or other supporting personnel in the schools, classes or positions of the Dyer County School System on a racially discriminatory basis, on the basis of the racially composition or the promotion of students in such schools or classes without regard for the qualifications, tenure rights or seniority as such teachers or personnel or on the basis of expressed, expected or apprehended attitudes

of racial hostility on the part of white administrators, teachers, students or other agencies in the community with respect to the discipline of white female students by a black male teacher or any other respect, deprives plaintiff and the class he represents, including other black actual and prospective administrators, teachers or applicants for said positions in said County, and including all black children attending schools in said County, of due process of law and of the equal protection of the laws as secured by the Fourteenth Amendment to the Constitution of the United States, and is therefore unconstitutional and void; and same also deprives said plaintiff and the class they represent of rights secured by 42 U.S.C., Section 1981, 1985, 1986, 1988 and 2000d in that they are thereby subjected by said state officials

under color of State Law to racial discrimination in said public school system of Dyer County, Tennessee, which receives federal financial assistance.

X.

The injury which the plaintiff and said members of his class suffer as a result of said racially discriminatory policies, practices, customs and usages and actions of defendants is irreparable and will continue to irreparably injure plaintiff and the class until enjoined by this Court. Any further relief to which the plaintiff and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause further irreparable injury and occasion damage, vexation and inconvenience not only to plaintiff and those similarly situated but

to defendant public school officials as such.

XI

Plaintiff further avers that said actions of all of the defendants as set out hereinabove in this Complaint and especially paragraph IX and X reflected adversely upon plaintiff's personal character and morality and upon his professional competence as an educator and administrator, thereby seriously damaging his standing in the community and imposing upon him a stigma which has foreclosed or has seriously damaged his freedom to take advantage of otherwise available employment and educational opportunities, entitling him to damages, both compensatory and punitive, as hereinafter prayed. Also said action of defendants, Vinson, Bell, Powers and Bowen, being done as aforesaid in and pursuant to a conspiracy to destroy or remove plaintiff

solely because of his action as a black male in paddling a white female student or students, as plaintiff now alleges, in circumstances herein such conspiratoral and punitive actions were never taken and would not have been taken in reference to white male teachers paddling either black or white female students, and the acquiescence and participation of all of the defendants, including all defendant Board Members and Superintendents in said racially discriminatory actions prior to and up to the final action of defendant on account of same, was violative of 42 U.S.C., Sections 1985 and 1986 entitling plaintiff to damages, both compensatory and punitive against all defendants herein as hereinafter prayed. Further, said general practice, policy and custom of demoting, discharging or otherwise penalizing black teachers, principals or other personnel in whose behalf plaintiff

sues in their professional or employment opportunities on the basis of real or imagined complaints of white teachers, school personnel, students, school patrons or community agencies against being supervised, taught, controlled or disciplined by black teaching personnel on the basis of such general allegations reflecting adversely on the character, morality or competence without affording said black teachers, principals or personnel adequate and full notice and opportunity for a full and fair hearing, likewise entitles all affected members of the class to damages, both compensatory and punitive.

•••

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

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[Caption Omitted]

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Answer (excerpts)

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•••

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

•••

THIRD DEFENSE

Reserving objection to the form of the pleading, these defendants state as follows in answer to the separately enumerated portions of the complaint:

I. They deny the jurisdictional

allegations contained in this paragraph and deny that plaintiff has any claim for relief under any substantive provisions of the United States Code or the Constitution of the United States cited by plaintiff or any claim arising under state law. Plaintiff had an adequate, speedy and simple remedy to review the alleged acts of defendants under the Tennessee Teacher's Tenure Act TCA § 49-1401 et seq., but failed to pursue the remedies provided therein, particularly in TCA § 49-1417 in a reasonable manner at the time his alleged claim arose in the year 1974.

...

VIII. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations concerning plaintiff's personal qualifications as alleged. It is denied that these defendants, or any of them, conspired to

transfer the defendant, to publish false allegations concerning him, or to wrongfully discharge the plaintiff from his employment with the Dyer County School System because of his race. With respect to plaintiff's discharge these defendants assert that requirements of state and federal law were observed and the proof adduced before the Board warranted the action taken; that written notice of the charges as required by law were furnished him and his counsel; that before final action was taken by the Board plaintiff was afforded the right to call witnesses to testify on his behalf and to cross-examine witnesses adduced in support of the charges; and that the delay in bringing about a final resolution of the matter was due, in large part, to the inability of plaintiff's counsel to schedule hearings. In the alternative, these defendants assert that plaintiff has waived

all alleged procedural defects by voluntarily participating in the proceedings before the Board through final disposition and by objecting to the presentation before the Board of certain key witnesses who were prepared to adduce additional proof in support of the written charges.

IX. Denied.

X. Denied.

XI. Denied.

XII. Denied.

FOURTH DEFENSE

These defendants are immune from suit by plaintiff because their actions, at all times relevant hereto, were taken in good faith and not in derogation of plaintiff's constitutional rights.

FIFTH DEFENSE

In the alternative, these defendants assert that if plaintiff was wrongfully discharged, which is denied, his damages, if

any, should be reduced by the amount of compensation he earned in other employment or could have earned by the exercise of due diligence.

SIXTH DEFENSE

Plaintiff's actions is barred by the application statute of limitations, T.C.A. § 28-304.

All allegations of the complaint not heretofore specifically admitted or denied are hereby denied.

Wherefore, premises considered, defendant's pray that plaintiff's complaint be dismissed and that they be allowed to go hence with their reasonable costs.

***

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

xxxxxxxxxxxxxxxxxxx

[Caption Omitted]

xxxxxxxxxxxxxxxxxxx

MOTION TO DISMISS ON BEHALF OF

DEFENDANTS, HELEN BELL, IRA POWERS

AND BOBBY BOWEN

Come now the defendants, Helen Bell, Ira Powers and Bobby Bowen, and respectfully move the Court to dismiss the Complaint filed against them herein by plaintiff, Leonard Webb, on the following grounds:

1. That the Complaint of plaintiff fails to state a claim upon which relief can

be granted as to these defendants, Helen Bell, Ira Powers and Bobby Bowen. Defendants' Motion is in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure.

2. That the Complaint of plaintiff shows on its face that any and all acts of these defendants complained of in said Complaint occurred more than one (1) year prior to the filing of the cause of action, and is therefore barred by applicable Statutes of Limitations under Tennessee Code Annotated 28-304 and Tennessee Code Annotated 28-303, and under 42 U.S.C.A. 1986, and in fact said actions occurred more than five (5) years prior to the filing of this cause of action.

3. That any cause of action of the plaintiff against these defendants is barred by applicable Statutes of Limitations contained in Tennessee Code Annotated 28-304

and Tennessee Code Annotated 28-303 and under 42 U.S.C.A. 1986, in that all of the acts complained of in the Complaint occurred more than five (5) years prior to the filing of this cause of action.

Defendants, Helen Bell, Ira Powers and Bobby Bowen, respectfully move the Court pursuant to the Federal Rules of Civil Procedure that this Motion should be treated as one for Summary Judgment and disposed of as provided by Rule 56, the Affidavits of these defendants in support of this Motion having been filed herein.

THEREFORE, defendants, Helen Bell, Ira Powers and Bobby Bowen, respectfully move the Court to dismiss the Complaint of plaintiff, Leonard Webb, as to them and that the Court enter an Order of Summary Judgment in favor of defendants, Helen Bell, Ira Powers and Bobby Bowen, and that they be allowed to go hence with their reasonable

costs.

...

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISON

****

[Caption Omitted]

****

AFFIDAVIT

STATE OF TENNESSEE

COUNTY OF DAVIDSON

Avon N. Williams, Jr., being first duly sworn, deposed and says:

1. I am Lead Counsel for plaintiff in the above case and represented plaintiff throughout his Administrative Hearing with the Dyer Board of Education.

2. The transcript attached hereto

was provided to me by the Dyer County Board of Education, and reflects some of the proceedings before said Board of Education upon the Administrative Hearing of plaintiff, Leonard Webb.

3. Said transcript contains numerous typographical and other errors and may be incomplete; however, other than a transcribed record of two hearings in my possession, said tendered transcript is the only transcript available to the best of my knowledge.

4. The failure to maintain an adequate record of the proceedings before the Board of Education is part of the complaint of plaintiff, Leonard Webb.

***

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

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[Caption Omitted]

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CONSENT ORDER OF DISMISSAL

This cause came on to be heard upon statement of counsel for the parties, as evidenced by their signature to this Order, that all matters in controversy herein have been compromised and settled by the payment to plaintiff of the sum of $15,400.00 as damages at law for the redress of his claims under 42 U.S.C. 1981 and by an award of equitable relief as set out below, with all matters relating to attorney's fees of plaintiff being expressly reserved.

IT IS, THEREFORE, BY CONSENT, ORDERED, ADJUDGED AND DECREED as follows that:

1. Except as provided below, plaintiff's action be, and the same is hereby, dismissed with prejudice.

2. Defendant, County Board of Education of Dyer County, Tennessee, will be treated as having reinstated plaintiff, as of April 10, 1974, as a teacher in good standing in the Dyer County, Tennessee School System, and plaintiff will be treated as having immediately thereafter resigned from said teaching position without any derogatory personnel actions, marks or implications upon or against his record as a teacher or employee of said School System; and the only reference said defendant, Board of Education of Dyer County, Tennessee, will furnish to others, on request, will be limited to inclusive dates of service and positions held by plaintiff with said Board

of Education.

3. All matters relating to fees of counsel for plaintiff are expressly reserved for resolution by agreement of the parties, or, in the absence of agreement, by the Court.

...

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

==========

[Caption Omitted]

==========

MOTION FOR AWARD OF COUNSEL FEES

AND EXPENSES

Plaintiff respectfully moves the Court to award counsel fees to his attorney, Avon N. Williams, Jr., and expenses to be taxed as a part of costs in the above case pursuant to Consent Order of Dismissal entered 13 October 1981, counsel having been unable to resolve these matters by agreement.

In support of the foregoing Motion plaintiff submits Affidavits of Avon N.

Williams, Jr., Esquire, in regard to counsel fees and expenses attached hereto marked Exhibits "A" and "B" respectively and supporting Memorandum.

***

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

****

[Caption Omitted]

****

AFFIDAVIT OF AVON N. WILLIAMS, JR., ESQUIRE

STATE OF TENNESSEE

COUNTY OF DAVIDSON

Avon N. Williams, Jr., after being duly sworn according to law, deposes and says

1. Deponent is and has been a practicing member of the Bar of the State of Tennessee since 1948 and the United States District Court for the Eastern, Middle and Western Districts of Tennessee since 1949, 1953 and 1962 respectively. He has been a member of the Bar of the United States Court

of Appeals for the Sixth Circuit since 1963. He also was admitted to the Bar of the State of Massachusetts in 1948 and to the Bar of the United States Court of Military Appeals about 1956. He was graduated from Boston University School of Law in 1947 with the L.L.B. Degree and in 1948 with the L.L.M. Degree and in 1948 with the L.L.M. Degree, which former Degree was subsequently converted to the J.D. Degree. He is and has been in the active practice of law in the State of Tennessee since 1948. In addition, he is and has been State Senator for the 19th Senatorial District of Tennessee since November 1968.

As counsel for plaintiff in the above case, deponent has performed the following services:

DATE	PROFESSIONAL SERVICES	HOURS
5 April 1974	Initial consulation	0.5
17 April 1974	Consultation and preparation of letter to Superintendent Vinson	2.0
29 April 1974	Review of letter from Superintendent Vinson and notification to client regarding May 27 Hearing	0.2
9 May 1974	Consultation with client and letter to Superintendent Vinson demanding specification of charges	1.0
13 May 1974	Review of letter from Superintendent Vinson and enclosed packet of documents reflecting alleged charges	2.0
21 May 1974	Consultation with client and preparation of letter to Superintendent Vinson requesting subpoena for witnesses	1.0
23 May 1974	Consultation with School Board Attorney regarding change in Hearing date	0.2
24 May 1974	Review of letter from Superintendent Vinson, phone consultation with Board Counsel and letter to Chairman of	

	Board regarding Hearing date	0.5
28 May, 1974	Review of letter from Board Chairman regarding 24 June Hearing date	0.1
5 June 1974	Preparation of letter to Vice Chairman of Board regarding 24 June Hearing date	0.2
17 June 1974	Review of letter from Vice Chairman of the Board setting 24 June 1974 Hearing date and notification of client	0.2
24 June 1974	Consultation with client and appearance before Board at Dyersburg (including round trip travel and interview of witnesses)	14.0
8 July 1974	Consultation with client and preparation of letter to Board Counsel regarding pay	0.6
4 September 1974	Review of letter from Board Counsel regarding resetting of Hearing and phone call to client 9-11-74	0.5
5 September 1974	Review of letter from Superintendent regarding pay and dictation of response to client	0.3
7 November 1974	Letter to Board regarding resetting of	

	Hearing	0.1
13 November 1974	Review of letter from Board Counsel regarding setting of Board Hearing on 12 December 1974 and preparation of notification to client and Board Counsel	0.3
2 December 1974	Consultation with client and preparation of list of witnesses to be subpoenaed or 12 December 1974 Board Hearing	2.0
3 December 1974	Supplemental letter to Board Counsel regarding witnesses to be subpoenaed	0.3
12 December 1974	Consultation with client and appearance before Board at Dyersburg (including round trip travel and interview of witnesses)	15.0
20 December 1974	Phone conversation with Board Counsel	0.2
30 December 1974	Phone conversation with Board Counsel	0.2
3-6 January 1975	Review of letter from Board Counsel and consultation with client	0.5
15 January 1975	Receipt of information and notification to client of 20 January 1975 Hearing date	0.2

28 January 1975	Review of letter from client	0.1
26 March 1975	Letter to Board Counsel regarding compromise and settlement	0.2
2 January 1976	Preparation of letter to Board Counsel regarding second offer of compromise and settlement	0.2
19 February 1976	Review of letter from client regarding status of case and letter to Board Counsel regarding compromise and settlement and/or conclusion of hearing	0.3
20 March 1976	Review of letter from client	0.1
27 March 1976	Preparation of letter to Board Counsel	0.2
24 April 1976	Response to client's letter of 17 March 1976	0.2
27 March 1976	Review of letter from Board Counsel declining settlement	0.1
20 August 1976	Consultation and letter to Board Counsel demanding resumption of Hearing after unsuccessful efforts to reach him by phone	1.3
3 September 1976	Review of letter from Board Counsel setting Hearing for 9 September	

	1976, phone calls and letter to Board Counsel suggesting conflict	0.5
22 September 1976	Review of letter from Board Counsel regarding suggested Hearing dates and preparation of response to Board Counsel	0.2
3 March 1977	Phone consultation with Board Counsel setting Hearing date for 20 May 1977 and letters of confirmation and notification	0.4
9 March 1977	Review of letter from client	0.1
23 March 1977	Review of letter from client regarding pre-hearing consultation and fixing of same for 11 April 1977	0.2
11 April 1977	Pre-hearing consultation with client and dictation of letter requesting subpoenas of witnesses	1.0
22 April 1977	Review of letter from client regarding witnesses	0.2
6 May 1977	Review of letter from Superintendent rescheduling Hearing date and notification to client	0.2
8 July 1977	Consultation with client	

	and prepration of letter to Board Counsel suggesting 11 August 1977 Hearing date	1.2
30 July 1977	Review of letter from Board Counsel	0.1
4 August 1977	Preparation of letter to Board Counsel again demanding Hearing date	0.1
19 September 1977	Review of letter from Board Counsel setting Hearing for 17 November 1977 and preparation of notification to client and letter of confirmation Board Counsel	0.2
21 September 1977	Letters to witnesses regarding 17 November 1977 Hearing	0.2
11 October 1977	follow-up letter to Board Counsel requesting transcript of prior Hearings	0.1
25 October 1977	Review of letter from Board Counsel regarding transcripts of prior Hearings and phone consultation with client regarding case	0.5
3 November 1977	letter from client regarding the expense of prior tapes and notification to Board Counsel indicating client's willingness	

	to share expense	0.2
10 November 1977	Review of letter from Board Counsel	0.1
15 November 1977	Preparation of telegram to Board Counsel regarding witnesses for 17 November 1977	0.5
17 November 1977	Travel to Dyersburg for hearing before the Board aborted by failure of Board to subpoena witnesses (including travel time roundtrip to Dyer County)	10.0
21 November 1977	Letter to Board Counsel regarding subsequent Hearing appearance dates	0.2
8 December 1977	A letter from Court Reporter enclosing transcript of 17 November 1977 proceedings and review of transcript	1.0
21 December 1977	Review of letter from Board Counsel regarding Hearing	0.1
13 March 1978	Review of letter from Board Counsel regarding resumption of Hearing and preperation of letter in response	0.2
31 March 1978	Review of letter from Board Counsel confirming resumption of Hearing on 21 April	

	1978 and preperation of list of witnesses to be subpeonaed for said Hearing along with letter of notification to client	0.6
7 April 1978	Review of letter from client	0.1
21 April 1978	Appearance before Board (including travel time round trip from Nashville views with witnesses)	14.0
28 April 1978	Review of letter from client	0.1
9 May 1978	Search for tapes and preparation of letter to Board Counsel regarding same	0.1
22 May 1978	Review of letter from Board counsel	0.1
10 June 1978	Review and forwarding of partial transcription of tapes to Board counsel	1.0
3 July 1978	Forwarding of tapes to Board Counsel	0.1
28 July 1978	Review of letter from Board Counsel	0.1
4 August 1978	Review of letter from client	0.1
23 August 1978	Review of letter from Board Counsel advising of Board's decision to uphold original	

	action and dictation of letter of response offering proposed settlement and requesting an equivocal Board decision	1.0
23 August 1978	Letter to client	0.1
2 September 1978	Review of letter from Board Counsel finalizing adverse decision against client and consultation with client	2.0
31 January 1979 10 February 1979	Letter renewing offer of compromise and settlement to Board Counsel; and client consultation	0.2
27 July 1979	Preparation of letter to client regarding law suit and request to Superintendent for membership of Board of Education	0.2
3-7 August 1979	Preparation and forwarding of Complaint in Federal Court lawsuit	8.0
4 September 1979	Phone Call from Weakley and Weakley, Attorneys, regarding extension	0.1
4 September 1979	Review of letter from Weakley and Weakley regarding extension of returning of Stipulation regarding same	0.1

3-8 October 1979	Review of Answer of defendants' Interrogatories an Request For Production of Documents submitted by defendants and forwarding of same to client for response	1.0
25 October to 17 November 1979	Preparation of plaintiff's Answers to Interrogatories and Request For Production of Documents and consultations regarding same	2.0
20 November 1979	Phone conversation with adversary counsel regarding Answers to Interrogatories	0.1
23 November 1979	Review of letter from adversary counsel regarding Answers to Interrogatories and request for Production of Documents	0.1
6 December 1979	Letter to client regarding Internal Revenue documents	0.1
7 January 1980	Review of Motion To Dismiss And/Or For Summary Judgment filed by defendants and preparation of Motion and Memorandum to extend time for response to same	1.0
7 January 1980	forwarding to adversary counsel	

	Authorization signed by plaintiff	0.1
12 January 1990	Preparation and forwarding of letters requesting information from former employers of plaintiff	0.3
17 January 1980	Review of letter from TVA regarding plaintiff	0.1
26 January 1980	Review of defendants' response to Plaintiff's Motion For Extension	0.2
28 January 1980	Review of Court Order referring plaintiff's Motion for Extension Magistrate	0.1
6 February 1980	Preparation and forwarding of plaintiff's response to defendants' Motion To Dismiss And/Or For Summary Judgment	1.5
15 February 1980	Review of Magistrate's Order granting an extension	0.1
19 February 1980	Review of defendants' Motion To Strike Plaintiff's Response to Defendants Motion and excepting to Magistrate's Order	0.2
6 February 1980	Preperation and forwarding of Response to defendants' Motion	

	To Strike Plaintiff's Response to defendants' prior Motion and excepting to Magistrate's Order	0.5
3 March 1980	Review of letter and offer of settlement from defense counsel and enclosed materials	1.0
6 March 1980	Letter to client regarding proposed compromise and settlement	0.1
6 February 1980	Letter from TVA regarding records	0.1
8 February 1980	Receipt and review of transcript	0.2
2 March 1980	Receipt and review of letter dated 29 February 1980 from Thomas R. Prewitt, Esquire, offering compromise and settlement	0.3
14 March 1980	Receipt and review of Webb personal history from TVA	1.0
31 March 1980	Receipt and review of letter from Thomas R. Prewitt, Esquire, revising offer of settlement	0.1
3 April 1980	Review of letter from TVA regarding Webb payroll records	0.2

7 April 1980	Review of letter from Thomas R. Prewitt, Esquire, dated 3 April 1980 regarding settlement and dictation of letter to client	0.2
21 April 1980	Review of letter from client declining settlement	0.,1
13 May 1980	Review of letter from Thomas R. Prewitt, Esquire	0.1
21 May 1980	Review of letter from Webb	0.1
24 May 1980	Dictation of letter to Thomas R. Prewitt, Esquire, regarding dictation of letter to Webb in respect to same	0.2
10 June 1980	Review of statement from defendant Board regarding earnings of Webb and forwarding of same to client	0.2
27 September 1980	Dictation of letter to Thomas R. Prewitt, Esquire, regarding consultation	0.2
6 October 1980	Review of letter from Thomas R. Prewitt, Esquire, dated 3 October 1980 and dictation of response fixing date for consultation	0.2
14 July 1980	Review of Order of	

	Court affirming Magistrate's decision on Motion To Dismiss Or For Summary Judgment	0.1
10 October 1980	Consultation with Thomas R. Prewitt, Esquire, in Nashville	1.0
28 November 1980	Letter to Thomas R. Prewitt, Esquire, regarding settlement demand	0.2
30 January 1981	Pre-trial/status conference at Memphis (Richard H. Dinkins, Esquire, representing firm and including travel time	4.0
7 February 1981	Review of Defendants' Second Request For Production Of Documents and Interrogatories and forwarding of same to client	0.3
3 March 1981	Receipt and review of Reply Brief In Support Of Motion To Dismiss of defendants, Bell, Powers and Bowen filed 27 February 1981	2.0
12 March 1981	Preparation of revised offer of compromise and settlement of (Richard H. Dinkins)	0.3

14 March 1981	Preparation of Motion and Affidavit for extension of time to file Supplemental Brief (Richard H. Dinkins, Esquire)	0.5
23 March 1981	Review of Order granting plaintiff's Motion for Extension	0.1
26 March 1981	Preparation of Response of plaintiff to Reply Brief in Support of Motion To Dismiss by defendants, Bell, Powers, and Bowen and Affidavit of Avon N. Williams, Jr., Esquire	1.0
3 June 1981	Review of letter and financial materials received from client	0.2
4 June 1981	Review of notice setting case for trial and inter office memo to Richard Dinkins, Esquire	0.2
27 June 1981	Review of Court Order granting continuance	0.1
11 July 1981	Dictation of letter to S. Russell Headrick, Esquire	0.1
24 July 1981	Letter to client regarding discovery	0.2

30 July 1981	Preparation and filing of Answer to Defendants'Second Request for Production Of Documents	0.5
30 July 1981	Preparation and forwarding of Plaintiff's Answers to Interrogatories for execution by the plaintiff	1.0
3 August 1981	Return of Plaintiff's Answers to Defendants' Second Set Of Interrogatories and forwarding of same to the Court	0.2
__ August 1981	Consultation with Thomas R. Prewitt, Esquire, regarding settlement	0.3
__ August 1981	Phone consultation with client regarding settlement	0.3
4 September 1981	Phone consultation with Thomas R. Prewitt, Esquire, conveying agreement upon settlement	0.1
9 September 1981	Dictation and forwarding of letter to Thomas R. Prewitt, Esquire, regarding settlement	4.0
11 September 1981	Dictation of Affidavit regarding time and counsel	

fees	0.4
TOTAL	141.1

The above does not include many phone calls and unrecorded consultations over a period in excess of seven years which is estimated to have entailed three office hours per year, or a total of 21 hours.

Affiant's regular charges for office work in 1974-76, both inclusive, were $60.00 per hour, in 1977-79, both inclusive were $90.00 per hour, in 1980- were $105.00 per hour and in 1981 were $120.00 per hour for routine commercial work at Nashville. Said fees apply to all work actually performed by the undersigned or under his supervision by any associate counsel in his office. All of the above work was performed under the personal supervision of the undersigned. Because of the protracted nature of the proceedings and the inflation factor, counsel believes that his current hourly

charge of $120.00 should be applied across the board and that an increment of 25% should be added in light of the peculiar difficulties involved in this particular kind of case and the unusual nature of the hours involved in the Board proceedings. Therefore, in the opinion of the affiant the fair market value of his serviced rendered in the above case, in light of all of the foregoing and of his reputation, standing and expertise in the profession, is: $21,165.00.

Further affiant saith not.

***

[CAPTION OMITTED]

AFFIDAVIT OF DWIGHT L. HEDGE

STATE OF TENNESSEE

COUNTY OF DYER

DWIGHT L. HEDGE, being duly sworn, makes oath as follows:

1. I am currently the Superintendent of the Dyer County Board of Education and I have personal knowledge of some of the circumstances surrounding the actions of the Dyer County Board of Education with regard to Leonard Webb. Futher, I have examined the transcript and administrative record of the proceedings of the Dyer County Board of Education relating to Mr. Webb which commenced in 1974 and continued until final disposition in August, 1978.

2. Based upon my knowledge and upon my review of the aforesaid record, the

following facts occurred relating to Mr. Webb's termination:

a. On March 25, 1974, C.J. Vinson, formerly Superintendent of the Dyer County Board of Education, sent a letter to Leonard Webb informing him that he had been suspended.

b. On April 10, 1974, Clayton Mayes, Chairman of the Dyer County Board of Education, wrote a letter wherein Mr. Mayes informed Leonard Webb that the Dyer County Board of Education had voted to dismiss Mr. Webb at a called meeting on April 9, 1974, based upon "written criticism of parents and school administrators regarding your teaching experience at Newborn Elementary School...."

c. Avon N. Williams, Jr., attorney for Leonard Webb, forwarded a letter to the Dyer County Board of Education, dated April 22, 1974, requesting, pursuant to T.C.A. § 49-1414, that he be

furnished written notice of the charges brought against Leonard Webb.

d. C.J. Vinson forwarded to Mr. Williams, by letter dated May 10, 1974, certain letters and reports pursuant to Mr. Williams' April 22, 1974 request.

e. In June, 1974, a hearing was held regarding Mr. Webb's dismissal before the Dyer County Board of Education pursuant to the request of Mr. Webb's attorney. Prior to this hearing, Mr. Williams had requested that the Board of Education subpoena certain witnesses and a dispute arose as to whether or not the Board of Education was authorized to do so. The subpoenas for Mr. Webb's witnesses were not issued prior to the hearing. At this hearing, Mr. Williams objected to the form of the notice of the charges brought against Mr. Webb, alleging that they were insufficient to inform him of the nature of the charges against him, and insufficient to allow him to prepare a

defense in the case. At that hearing, no proof was put on by the Board of Education, and Mr. Williams strenuously objected to the fact that the burden of proof was being placed upon his client to disprove the allegations contained in the charge without an opportunity to confront and cross-examine the witnesses. Reserving his objections on that point, Mr. Williams proceeded to produce testimony from witnesses in support of his client.

f. The hearing was continued until later in 1974 when Mr. Williams produced further testimony in support of his client's position.

g. Due to apparent scheduling difficulties, the next hearing was held on November 17, 1977, but no testimony was heard at that time because of a problem encountered in obtaining the presence of witnesses by subpoena.

h. A final hearing was held on

April 21, 1978, at which time Mr. Vinson, the former Superintendent of the Dyer County Board of Education, and Ms. Helen Bell, Mr. Webb's supervisor, were prepared to testify in support of the charges against Mr. Webb. After Ms. Bell was sworn, Mr. Williams objected that the entire procedure had violated due process in that the School Board had, he contended, improperly placed the burden of proof upon his client. Mr. Williams presented further proof at this time in support of his client's position. At the conclusion of this hearing, since such a long time had elapsed since the first hearing in the matter, and since the membership of the School Board had changed, it was agreed that Mr. Lanier, counsel for the Dyer County Board of Education, and Mr. Williams would submit to the Board a transcript of tapes of the earlier hearings, and that the Board would render a decision in the matter following the submission of

the transcripts. By letter dated August 21, 1978, Mr. Lanier informed Mr. Williams that the Dyer County Board of Education had, on Tuesday, August 15, 1978, voted unanimously to uphold the original action for the Board in dismissing Mr. Webb.

DWIGHT L. HEDGE

•••

[CAPTION OMITTED]

AFFIDAVIT

STATE OF TENNESSEE X

:

COUNTY OF SHELBY X

RUSSELL X. THOMPSON, on oath, states as true the following:

1. I have been a practicing attorney at the Memphis Bar since 1965. I represented the Memphis Education Association, an organization of teachers employed by the local School System, for approximately eight years prior to 1979. I have represented teachers, far too numerous to mention, in administrative hearings conducted under the Tennessee Tenure statutes. I have handled many suits on behalf of teachers and others in the Federal Court involving claims for redress under 42 U.S.C. § 5 1981, et seq. and the Fourteenth Amendment to the U.S. Consti-

tution. A major emphasis of my practice has been in the practice of labor and criminal law and representing various clients before Civil Service, Teacher Tenure and other administrative boards.

2. I have reviewed the Affidavit of Avon N. Williams, Jr., Esq., dated September 11, 1981 and filed in the case of Leonard Webb v. County Board of Education of Dyer County, et seq., cause No. C-79-2574-B, U.S. Dist. Ct., W. D. Tenn. I have also reviewed the complaint filed by the plaintiff in said cause on August 13, 1979 and Consent Order of Dismissal filed in said cause on October 13, 1981.

3. I am familiar with the reasonable and customary charges of attorneys practicing law in the Western Division of Tennessee in respect to legal services rendered in (a) administrative proceedings before Civil Service, Teacher Tenure and other boards, and (b) suits brought under 42

U.S.C. §§ 1981, et seq. and the Fourteenth Amendment to the U.S. Constitution seeking redress for alleged violations of civil rights.

4. In my opinion, based upon my knowledge of fees customarily charged by attorneys for types of legal services rendered as depicted in said Affidavit of Mr. Williams, and my own experience in the handling of similar matters, that a reasonable fee for all services rendered by Mr. Williams (a) in the administrative proceedings before the Dyer County Board of Education and covering the period April 5, 1974 to February 10, 1975, is $3,500, and (b) in connection with said Federal Court proceedings is $1,000.00.

RUSSELL X. THOMPSON

[CAPTION OMITTED]

AFFIDAVIT

STATE OF TENNESSEE X

:

COUNTY OF SHELBY X

HENRY L. KLEIN, on oath, states as true the following:

1. I have been a practicing attorney at the Memphis Bar since 1960. I have had extensive experience as a trial lawyer in all the courts of Tennessee and the United States District Court. I have handled for the defense many civil rights cases in the Federal Court, particularly suits brought against Police Officers under 42 U.S.C. §§ 1981 et seq.

2. I am familiar with the reasonable and customary charges of attorneys for legal services rendered in respect to legal

services in all civil matters, including civil rights actions brought under 42 U.S.C. §§ 1981 et seq. and the Fourteenth Amendment to the U.S. Constitution.

3. I have reviewed the Affidavit of Avon N. Williams, Jr., Esq., dated September 11, 1981 and filed in the case of Leonard Webb v. County Board of Education of Dyer County, et al., cause No. C-79-2574-B, U.S. Dist. Ct., W.,D. Tenn., Western Division. I have also reviewed the complaint filed in said cause on August 13, 1979, and Consent Order of Dismissal filed October 13, 1981.

4. In my opinion, based upon my knowledge of fees customarily charged by attorneys in the Western District of Tennessee for the types of services rendered as depicted in said Affidavit of Mr. Williams, and my own experience in the handling of cases brought under 42 U.S.C. §§ 1981 et seq. that a reasonable charge for all services rendered by Mr. Williams (a) in

the administrative proceedings before the Dyer County Board of Education covering the period april 5, 1974 to February 10, 1079 is $50.00 per hour, and (b) in the Federal Court proceedings is $75.00 per hour.

HENRY L. KLEIN

AFFIDAVIT

STATE OF TENNESSEE

COUNTY OF SHELBY

Allen S. Blair, on oath, states as true the following:

1. I am a partner in the Memphis law firm of Hanover, Walsh, Jalenak and Blair. I graduated from Vanderbilt Law School and was admitted to the Bar in 1970. Thereafter I served as law clerk to Chief Judge Bailey Brown until the summer of 1971, at which time I became associated with said law firm, becoming a partner in 1975. During the first few years of my practice, my primary legal work was in the representation of employees, unions and union trust funds and for the last three and one-half years my

practice has been almost exclusively devoted to the representation of such clients. I am presently chairman of the Tennessee Bar Association Labor Law Section.

2. I have had extensive experience in representing employees in discharge cases before the N.L.R.B., Civil Service boards, in arbitration proc boards, in arbitration proceedings and in civil rights cases in the federal Courts.

3. I have reviewed the Affidavit of Avon N. Williams, Jr., Esq., dated September 11, 1981 and filed the case of Leonard Webb v. County Board of Education of Dyer County, et al., Cause No. C-79-2374-B, U.S Dist. Ct., W.D. TENN. I have also reviewed the complaint filed by the plaintiffs in said cause on August 13, 1979 and Consent Order of Dismissal filed in said Cause on October 13, 1981.

4. I am familiar with the reasonable and customary charges of attorneys prac-

ticing law in the Western District of Tennessee in respect to legal services rendered in representing employees in (a) administrative proceedings before various boards including Civil Service boards and N.L.R.B, and (b) suits brought under 42 U.S.C. § 1981, et seq. and the Fourteenth Amendment to the U.S. Constitution seeking redress for alleged violations of civil rights.

5. In my opinion, based upon my knowledge of fees customarily charged by attorneys in the Western District of Tennessee for the types of services depicted in said Affidavit of Mr. Williams, and my own experience in the handling of similar matters, that a reasonable charge for all services rendered by Mr. Williams (a) in the administrative proceedings before the Dyer County Board of Education covering the period April 5, 19784 to Feb. 10, 1979 is $60.00 per hour, and (b) in the federal

Court proceedings is $60.00 per hour.

ALLEN S. BLAIR

•••

AMICUS CURIAE

BRIEF

Office-Supreme Court, U.S.
FILED
JUL 9 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LEONARD WEBB,

Petitioner,

v.

COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

ROBERT E. WILLIAMS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1360

LEONARD WEBB,
Petitioner,

v.

COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council respectfully submits this brief as amicus curiae with the written consent of the parties. Statements of consent have been submitted to the Clerk of the Court. This brief urges that the decision of the Sixth Circuit be affirmed, and thus the brief supports the position of the Respondents.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of the Council are firmly committed to the principle of nondiscrimination and equal employment opportunity.

The issue before the Court involves the proper interpretation of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Lawsuits challenging allegedly discriminatory employment practices are often brought under 42 U.S.C. § 1981, which is one of the statutes covered by § 1988. Therefore, the interpretation of attorney fees under § 1988 will directly affect employers whose employment practices are challenged. Substantially all of the Council's members, or their constituents, are subject to the provisions of § 1981 and consequently § 1988. As such, they have a direct interest in the manner in which Section 1988 is interpreted and applied.

The Equal Employment Advisory Council has participated as *amicus curiae* in other cases before this

Court relating to equal employment opportunity issues. *See, e.g., Hensley v. Eckerhart*, —— U.S. ——, 103 S.Ct. 1933 (1983) (attorney's fees), *Christiansburg Garment v. EEOC*, 434 U.S. 412 (1978) (attorney's fees), and *General Building Contractors Association, Inc. v. Pennsylvain*, 458 U.S. 375 (1982) (Section 1981).

STATEMENT OF THE CASE

The question presented to the Court is whether 42 U.S.C. § 1988 authorizes the recovery of attorney fees incurred in optional state administrative proceedings. The issue arises from a lawsuit originally filed in 1978 by Leonard Webb, a teacher in the Dyer County School system, who alleged that he was discharged from his position for discriminatory reasons. The plaintiff was suspended from his position in March of 1974 and, shortly thereafter, discharged for unprofessional conduct and insubordination. Webb sought review of his dismissal in administrative proceedings before the school board; however, the discharge was upheld by the Board. He then filed this suit under 42 U.S.C. Sections 1981, 1983, 1985, 1986, 1988, and 2000d.

The parties settled their case, awarding plaintiff $15,400 in damages and a decree ordering the Board both to treat the plaintiff as having resigned and to place no disparaging remarks on his professional record. The settement, however, did not provide for the recovery of attorney's fees; therefore, the plaintiff proceeded with his Section 1988 fees claim. The district court awarded $9,700 in fees for services rendered by plaintiff's counsel before the district court, but denied attorney's fees for efforts devoted to the state administrative hearing, at which plaintiff was not successful. The court reasoned that Section 1988

provided for the awarding of attorney fees for administrative actions only where those proceedings were a prerequisite to filing suit in federal court. Because the state administrative proceedings pursuant to Webb were not mandated by statute, he was not entitled to recover attorney fees. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the district court's denial of fees incurred at the administrative proceeding. The plaintiff then petitioned this Court for a writ of certiorari on the attorney's fees questions.

SUMMARY OF THE ARGUMENT

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 provides in pertinent part.

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This Court is presently faced with the question of whether the words "action or proceeding" include non-mandatory state administrative proceedings. It is the position of the Amicus Curiae that the District Court properly held that Section 1988 does not authorize a prevailing party in a federal suit to recover attorney fees for services rendered in non-mandatory administrative proceedings.

The American Rule regarding attorney fees is that litigating parties bear the cost of their own attorney fees unless there is an express statutory authorization or a well settled equitable reason for shifting the fees. This Court has always looked with care at the Congressional intent in enacting an attorney fees provision to ensure that the Court does not go beyond the Congressional intent in interpreting an attorney fee statute.

In analyzing Section 1988, it becomes apparent that Congress did not intend the term "proceeding" to include non-mandatory state administrative proceedings. The legislative history clearly shows that Congress intended only to authorize the recovery of attorney fees incurred in *judicial* forums empowered to enforce the provisions of the designated civil rights statutes.

In *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), this Court carefully considered the Congressional intent in enacting the Title VII attorney fee provision and held that it authorizes the recovery of attorney fees in statutorily mandated administrative proceedings. Because Title VII prevents a party from bringing an action in court until the prerequisite administrative proceedings have been satisfied, the Court reasoned that Congress must have intended the attorney fee provision to cover the administrative proceedings as well as judicial actions. Neither section 1988, nor any of its predicate statutes, have prerequisite administrative proceedings which act as a bar to bringing a judicial action. Because the Civil Rights statutes and Section 1988 do not encompass an enforcement scheme necessitating the resort to administrative proceedings prior to bringing suit, there is no reason to infer that Congress intended to include administrative proceedings in the Section 1988 attorney fee provision.

Petitioner's failure to prevail on any of his claims at the administrative level reinforces the argument that petitioner is not entitled to recover attorney fees

for the services rendered in pursuing his administrative claim. It is well settled that Section 1988 entitles only prevailing parties to recover attorney fees for issues upon which they prevail. The fact that a nonmeritorious complaint is brought in good faith is insufficient grounds for awarding attorney fees. Under the express terms of Section 1988, a party must prevail in order to recover attorney fees. *See Hensley v. Eckerhart*, —— U.S. ——, 103 S.Ct. 1933 (1983).

ARGUMENT

THE DISTRICT COURT PROPERLY HELD THAT CONGRESS FAILED TO EXPRESS THE NECESSARY INTENT IN ENACTING SECTION 1988 WHICH WOULD AUTHORIZE THE SHIFTING OF ATTORNEY FEES IN NON-MANDATORY STATE ADMINISTRATIVE PROCEEDINGS. ABSENT THAT EXPRESS INTENT, THE AMERICAN RULE PRECLUDES AN AWARD OF ATTORNEY FEES TO PLAINTIFF'S COUNSEL.

I. Absent an express Congressional intent authorizing the shifting of attorney fees, the American Rule that litigating parties bear the cost of their own attorney fees must be followed.

The American Rule regarding attorney fees is that litigating parties bear the cost of their respective attorney fees. The rule applies in all cases, except where Congress has statutorily authorized the awarding of attorney fees to the prevailing litigant or where this Court has held that certain equitable circumstances justify the awarding of such attorney fees.[1] Absent one of these equitable exceptions, or an

[1] *See, e.g., Vaughan v. Atkinson*, 369 U.S. 527 (1962) (bad faith); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923) (willful disobedience of a Court order); *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885) (common fund).

express statutory authorization, the American Rule will be followed. As stated as early as 1796 and reaffirmed as recently as 1982, "[t]he general practice of the United States is in opposition to it [awarding attorney fees to the prevailing party]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 1 L.Ed. 613 (1796); *Summit Valley Industries v. Local 112, United Brotherhood of Carpenters and Joiners of America*, 456 U.S. 717, 721 (1982).

In *Alyeska Pipeline Service Company v. The Wilderness Society*, 421 U.S. 240 (1975), this Court discussed the American attorney fee rule and pointed out that Congress has chosen not to abrogate the Rule by authorizing the courts to award attorney fees whenever they find it appropriate to do so. Rather, Congress has created "specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights."[2] This Court cannot go beyond the limitations of these explicit provisions created by Congress. Even when public policy reasons are advanced for shifting attorney fees, the Court is bound to stay within the confines of the express statutory provisions authorizing the shifting of attorney fees.

The inadequacy of public policy reasons for shifting attorney fees was recently reaffirmed by this Court in *Summit Valley Industries v. Local 112, United Brotherhood of Carpenters & Joiners of America*, 456 U.S. 717 (1982). In *Summit Valley*, the petitioner sought the recovery of attorney fees

[2] 421 U.S. 240 at 260.

under Section 303 of the Labor Management Relations Act codified at 29 U.S.C. § 187. After finding that the language of the statute did not specifically authorize the awarding of attorney fees nor did the legislative history reveal an intent to award the fees, the Court refused to award the fees. Although petitioner argued that not to award the fees would be contrary to the public policy of fully compensating an injured party, the Court reasoned that in the absence of clear support for interpreting the language or the legislative history of Section 303 as authorizing the shifting of attorney fees, the Court would decline to establish an exception to the well established American Rule.

The *Summit Valley* rationale applies to the instant case. Absent clear support for construing the language of Section 1988, or the legislative history of that section, as authorizing the shifting of attorney fees, this Court should not make a broader exception to the American Rule than Congress intended. As shown in part II below, neither the statutory language nor the legislative history supports a reading of Section 1988 which would authorize the shifting of attorney fees in non-mandatory administrative proceedings pursued by the petitioner.

II. The language and legislative history of Section 1988 show that Congress intended to provide for the recovery of attorney fees only in judicial actions.

By its terms, Section 1988 applies only to actions or proceedings "to enforce a provision of" one of the specifically-designated federal civil rights laws. It is clear from the legislative history of Section 1988 that Congress, in enacting this language, had in mind only proceedings before judicial tribunals empowered to

enforce the provisions of these statutes. The legislative history of § 1988 nowhere indicates that attorney fees should be awarded in non-mandatory administrative proceedings. The logical inference to be drawn from the lack of any reference to administrative proceedings, coupled with the continual references to providing a judicial forum to all persons, is that Congress did not intend § 1988 to apply to optional administrative proceedings.

Nowhere in the legislative history is there any explicit or indirect reference to the recovery of attorney fees incurred as a result of voluntary administrative proceedings that were not a predicate to bringing a federal civil rights claim. In fact, the Congressional reports indicate that Congress was contemplating only the recovery of attorney fees for judicial actions. As stated in the Senate Report,

> The purpose and effect of S. 2778 are simple—it is designed to allow *courts* to provide the familiar remedy of reasonable counsel fees to prevailing parties in *suits* to enforce the civil rights acts which Congress has passed since 1866. . . .
>
> In many cases arising under our civil rights laws, the citizen who must *sue* to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights *in court*. (Emphasis added).[9]

and

> Enforcement of laws depends on governmental action and, in *some cases*, on *private action*

[9] S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976).

> *through the courts.* If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases. (Emphasis added).[5]

The House Report reflects a similar intent on the part of the members of the House of Representatives, stating that the purpose of Section 1988 is "to give [plaintiffs] effective access to the judicial process."[6]

Several courts have reviewed this legislative history to determine the Congressional intent in selecting the terms "action or proceeding."[7] These courts have found that the legislative history indicates that Congress intended the words "action or proceeding" to designate only lawsuits. The court below, in reviewing the legislative history, explained, "The notion that attorney's fees are available only for services rendered in court permeates the entire document. [S. Rep. No. 94-1011]"[8]

While it is clear that Section 1988 was intended to give access to the judicial process, nothing in the

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[5] *Id.* at 6.

[6] H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) at 1.

[7] *Latino Project, Inc.* v. *City of Camden*, 701 F.2d 262 (3d Cir. 1983); *Blow* v. *Lascaris*, 533 F. Supp. 918 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 670 (2d Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 228, 74 L.Ed.2d 179 (1982); *Tower* v. *CIR*, 629 F.2d 889 (3d Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); *Webb* v. *County Board of Education of Dyer County, Tennessee*, 715 F.2d 254 (6th Cir. 1983).

[8] *Webb* v. *County Board of Education of Dyer County, Tennessee*, 715 F.2d 254 at 258 (6th Cir. 1983).

legislative history indicates that Congress was concerned with facilitating access to state administrative procedures. In fact, the legislative history of the civil rights laws which are encompassed in Section 1988 indicates that Congress was interested in guaranteeing access to the federal courts to circumvent situations in which the state administrative proceedings fail to be fair forums.[9] It is, therefore, anomalous to suggest that a county school board proceeding would be an appropriate proceeding to enforce a civil rights law.[10]

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[9] This Court on numerous occasions has considered the legislative history of the Civil Rights Acts, particularly Sections 1981 and 1983. *General Building Contractors Association* v. *Pennsylvania*, 458 U.S. 375 (1982); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Monroe* v. *Pape*, 365 U.S. 167 (1961). The Court has continuously found that the Congressional intent behind these sections was to afford persons a federal remedy as an alternative to inadequate state proceedings. *See, Monroe* v. *Pape*, 365 U.S. 167, 180 (1961).

This Court recently reemphasized the difference between the federal civil rights actions and state administrative proceedings, noting that the "dominant characteristic of [federal] civil rights actions" is that "they belong in court." *Burnett* v. *Grattan*, —— U.S. ——, 52 U.S.L.W. 4976, 4919 (June 28, 1984). The Court also noted that the "goals of the federal [civil rights] statutes are compensation of persons whose civil rights have been violated, and *prevention of the abuse of state power.*" *Id.*

[10] It is inaccurate to assume that unless the term "proceeding" is interpreted as encompassing administrative proceedings, the term is left meaningless. As stated in *Tower* v. *Commissioner of Internal Revenue*, 629 F.2d 889 (3d Cir. 1980), *cert. denied*, 450 U.S. 916 (1981),

> We do not retreat from this conclusion [that Congress did not intend to provide § 1988 attorney fees in tax proceedings] because of the argument that unless administrative proceedings are included within the phrase "civil

Allocating the shifting of attorney fees in non-mandatory administrative proceedings in no way advances the Congressional intent of providing access to judicial forums. When there are no statutorily mandated prerequisites to filing a lawsuit, there is nothing to prevent plaintiffs from bringing that action in court. The access to judicial forums which Congress intended to provide has been given. Since there is no indication that Congress intended to go beyond awarding attorney fees to prevailing parties in judicial actions, the Court must likewise go no further in interpreting the statute.

III. Denial of attorney fees for non-mandatory state administrative proceedings is in accordance with this Court's decision in *New York Gaslight Club, Inc. v. Carey*, and other court decisions.

The Title VII attorney fees provision, which this Court interpreted in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), is an example of an explicit statutory provision authorizing the shifting of attorney fees to protect a specific federal right. In *New York Gaslight*, the Court held that Section 706 (k) of Title VII authorizes the recovery of attorney fees for services rendered in administrative proceedings mandated by Title VII.

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action or proceeding," the word proceeding is effectively eliminated from the statute. On the contrary, when, for example, the Secretary applies to a district court judge under section 7604 of the Internal Revenue Code to enforce a summons, he could be said to be initiating a judicial proceeding as opposed to a civil action. Therefore, the word proceeding has a meaning independent of "civil action" without requiring that we expand the statute to encompass administrative proceedings.

629 F 2d 899 at 902.

Title VII has an extensive scheme, not found in other civil rights statutes, providing for deferral of charges to the state administrative process. Pursuant to Section 706(c) of Title VII, when an unlawful employment practice is alleged to have occurred in a State or locality which has a law prohibiting such practices, no charge may be filed with the EEOC by the charging party before the State or local agency has had 60 days to commence proceedings, unless the State or local proceedings have been terminated.[10] When a charge is filed with the EEOC prior to exhaustion of state or local remedies, the complaint is held in suspension while the EEOC refers the complaint to the state or local agency, thus giving them an opportunity to act first. The EEOC automatically reassumes jurisdiction over the complaint after 60 days or upon the termination of the state proceedings, whichever comes first. The EEOC may then bring an action after an additional 30 days if it determines that there is probable cause to believe that the charge is true. If the Commission does not file suit or enter into a conciliation agreement to which the complainant is a party, within 180 days after it reassumes jurisdiction, it must issue a "right to sue" letter notifying the complainant of his right to bring an action within 90 days. It is not until plaintiff receives a right to sue letter that the plaintiff has an independent claim which can be sued upon in federal court.

In interpreting the Title VII attorney fee provision, the Court in *New York Gaslight* considered this statutory scheme and concluded that because the en-

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[10] *New York Gaslight Club, Inc. v. Carey*, *supra*; *Love v. Pullman Co.*, 404 U.S. 522 (1972).

forcement scheme encompassed *mandatory* initial resort to state administrative proceedings, the attorney fee provision was intended to cover those proceedings. As the Court stated,

> It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as *supplements* to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief. See *Alexander v. Gardner-Denver Co.*, 415 U.S., at 48-50, 94 S. Ct., at 1019-1021.
>
> The construction of § 706(k) that petitioners advocate clashes with this congressional design. Complainants unable to recover fees in state proceedings may be expected to wait out the 60-day deferral period, while focusing efforts on obtaining federal relief. . . . Only authorization of fee awards ensures incorporation of state procedures as a meaningful part of the Title VII enforcement scheme.[11]

Denying attorney fees for services rendered in the nonmandatory administrative proceedings in a Section 1988 case would be in accordance with this Court's *New York Gaslight* holding. The complex statutory scheme mandating administrative proceedings prior to bringing a Title VII action in court is not present under Section 1988 or under other statutes for which Section 1988 provides attorney's fees for the prevailing party.

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[11] 447 U.S. 54, at 68.

There is no statutory requirement that plaintiffs suing under Section 1988 exhaust any administrative remedies. *Latino Project, Inc. v. City of Camden*, 701 F.2d 262, 264 (3rd Cir. 1983); *Blow v. Lascaris*, 523 F. Supp. 913, 916 (N.D.N.Y. 1981), *aff'd*, 668 F.2d 670 (2d Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 225, 74 L.Ed.2d 179 (1982). Furthermore, none of the predicate civil rights statutes included in Section 1988 require any administrative proceedings. See *Patsy v. Florida*, 457 U.S. 496 (1982) (no requirement that plaintiffs must exhaust state administrative remedies before bringing Section 1983 suit in federal court); *Cannon v. University of Chicago*, 441 U.S. 677, 706-708 n. 41 (1979) (no requirement that plaintiffs must exhaust administrative remedies before bringing Title IX suit in federal court); *Long v. Ford Motor Company*, 496 F.2d 500, 503 (6th Cir. 1974) (no requirement that plaintiff exhaust Title VII administrative remedies before bringing Section 1981 claim in federal court). Therefore, to deny the recovery of attorney's fees in the present case is consistent with this Court's holding in *New York Gaslight*.

Several circuits, in addition to the Sixth Circuit below, have found the distinction between mandatory administrative proceedings and non-mandatory administrative proceedings to be decisive in determining whether attorney's fees should be shifted onto the losing litigant. Indeed, it is well established that the several statutes for which Section 1988 provides attorney's fees were enacted because of the perceived inadequacies of available state forums. In *Blow v. Lascaris*, 523 F. Supp. 913 (N.D.N.Y. 1981), 668 F.2d 670 (2nd Cir.), *cert denied*, —— U.S. ——, 103

S.Ct. 225, 74 L.Ed.2d 179 (1982), the district court said,

> The distinguishing characteristic between § 706 (k) of Title VII and § 1988, however, and thus between Gaslight and the instant case, is that no Congressional policy exists under § 1983, or any of the civil rights statutes enumerated in § 1988, which mandates that civil rights claimants initiate their actions at the state or local level before an action in federal court is proper. To the contrary, § 1983 was adopted with the purpose:
>
> to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, *state laws might not be enforced and the claims of citizens* to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment *might be denied by the State agencies.* *Monroe* v. *Pape*, 365 U.S. 167, 180, 81 S. Ct. 473, 480, 54 L.Ed.2d 492 (1961) (emphasis added).

523 F. Supp. at 916. The Minnesota District Court followed this same rationale in *Derkeim* v. *Hennepin County Bureau of Social Services, Department of Community Services*, 524 F. Supp. 1321 (D. Minn. 1981), *aff'd on other grounds*, 688 F.2d 66 (8th Cir. 1982). Other circuits have affirmed that this distinction is decisive but have held that a party obtaining total recovery at the administrative level no longer has a meritorious complaint to bring before the court. *Latino Project, Inc.* v. *City of Camden*, 701 F.2d 262 (3rd Cir. 1983); *Estes* v. *Tuscaloosa County*, 696 F.2d 898 (11th Cir. 1983).[12]

[12] For the reasons stated above, the holdings of the Seventh Circuit in *Chrapliwy* v. *Uniroyal*, 670 F.2d 760 (7th Cir. 1982); *cert. denied*, —— U.S. ——, 103 S. Ct. 2428 (1983), and *Clarkson* v. *City of Chicago*, 686 F.2d 511 (7th Cir. 1982), should not be followed.

IV. Petitioner's failure to meet the *Hensley* v. *Eckerhart* prevailing party test at the administrative level precludes petitioner from receiving attorney fees for services rendered at that level.

In the instant case, the plaintiff was unsuccessful in his claims before the School Board. Therefore, denial of attorney's fees also would be in accordance with this Court's holding in *Hensley* v. *Eckerhart*, —— U.S. ——, 103 S.Ct. 1933 (1983), which held that fees may be obtained only for those issues upon which the plaintiff succeeds. In *Hensley*, this Court was faced with the question of whether, under § 1988, a partially prevailing plaintiff may recover attorney's fees for legal services on unsuccessful claims. The Court reviewed the Congressional intent in enacting Section 1988 so as not to exceed the statutory authority in awarding fees, and found,

> "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. . . . *the most critical factor is the degree of success obtained.* (emphasis added)[13]

Here, the petitioner was unsuccessful on his entire claim at the administrative level. Therefore, to award attorney fees for that proceeding would clearly be beyond the scope of Section 1988. Furthermore, alleging that petitioner was a prevailing party at the administrative level because of his success at the judicial level is inconsistent with the statutory scheme of § 1988. As stated previously, nothing in Section

[13] 103 S.Ct. 1933 at 1941.

1968 mandates administrative proceedings prior to bringing an action in court. Therefore, there is absolutely no significant connection between the administrative proceedings and the judicial proceedings. While petitioner is entitled to recovery of attorney fees for the successful settlement of his judicial action, he is not entitled to recover attorney fees for services rendered at his unsuccessful administrative proceeding.

CONCLUSION

For the reasons set forth, the Amicus Curiae respectfully suggests that the decision of the Sixth Circuit be affirmed.

Respectfully submitted,

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BRIEF

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No. 83-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LEONARD WEBB,
Petitioner,

VS.

COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, *et al.*,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit

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QUESTION PRESENTED

Were the district court and court of appeals correct in holding that petitioner was not entitled to an award of attorney's fees under 42 U.S.C. § 1988 for representation of petitioner in state administrative hearings terminated adversely to petitioner prior to filing a federal civil rights action where plaintiff was not required to pursue his administrative remedies before filing his civil rights action?

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122 Cong. Rec. 35,122 (1976) 12

No. 83-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LEONARD WEBB,
Petitioner,

vs.

COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, *et al.*,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

On March 25, 1974, C. J. Vinson, the former Superintendent of the County Board of Education of Dyer County, Tennessee (hereinafter referred to as "The Board"), sent a letter to petitioner informing him that he had been suspended from his position as a teacher with the Board. (J.A. 58). Petitioner was informed by letter dated April 10, 1974, that the Board had voted to dismiss him. (Id.) Rather than filing a civil rights action in court to challenge his dismissal, petitioner chose to pursue hearings before the Board under the Tennessee Teachers' Tenure Act, Tenn. Code. Ann. § 49-5-501, *et seq.* (1983).

Commencing in June, 1974, the Board conducted hearings concerning petitioner's dismissal pursuant to the request of peti-

tioner's counsel. (J.A. 59). At those hearings, petitioner's counsel objected to certain procedural aspects of the Board's hearing as violating petitioner's due process rights under the Tennessee and United States Constitutions. (*Id.* at 59-60).

Three hearings at which proof was presented were held by the Board, including a final hearing on April 21, 1978. (J.A. 60-61). At that hearing, Mr. Vinson, the former Superintendent of the Board, and Ms. Helen Bell, petitioner's supervisor, were prepared to testify before the Board in support of the charges against petitioner.[1] After Ms. Bell was sworn, petitioner's counsel objected that the entire procedure had violated due process in that the Board had, he contended, improperly placed the burden of proof upon his client. (*Id.* at 61). Ms. Bell and Mr. Vinson, who were responsible for petitioner's suspension, did not testify before the Board.

The Board voted unanimously on August 15, 1978, to uphold its original action in dismissing petitioner. (J.A. at 62). Petitioner's counsel was informed of this decision by letter dated August 21, 1978. (*Id.*).

Petitioner filed his complaint in the district court on August 13, 1979. (J.A. 2). In addition to presenting claims of race discrimination in his discharge, petitioner asserted that the procedures employed in the Board hearings violated his due process rights. (*Id.* at 6, 12). Petitioner also sought $1,000,000.00

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[1] Although two principals under whom petitioner had taught were called by the Board to testify at one of the previous hearings, these witnesses testified that they were not responsible for recommending petitioner's dismissal or reporting to the Board concerning petitioner's conduct. See pages 155, 186 and 201 of the partial transcript of hearings before the Board which is attached to the affidavit of petitioner's counsel and designated as Record Item 30 according to the docket sheet of the district court. Items in the Record are hereinafter cited as "R. Item" according to the number assigned each item on the district court docket sheet.

damages on account of allegedly malicious and false complaints of white teachers and administration personnel which damaged petitioner's reputation and led to his discharge. (R. Item 2 at 5-6).

Although the complaint was filed as a class action on behalf of petitioner and all black teachers and students in the school system operated by the Board, (R. Item 2 at 6-7), in the more than two years the action was pending in the district court, petitioner never sought or obtained certification of the suit as a class action.

All respondents except Bell, Bowen and Powers filed an answer to petitioner's complaint. (J.A. 21). Respondents Bell, Bowen and Powers filed a motion to dismiss or for summary judgment, claiming that the statute of limitations barred petitioner's claims against them. (*Id.* at 26-29).[2]

Settlement negotiations were commenced by the Board's counsel in March, 1980. (J.A. 50). In an effort to ascertain petitioner's claimed damages, the Board filed two sets of interrogatories and requests for production of documents relating to petitioner's employment and earnings subsequent to his termination in 1974, to which petitioner responded. (R. Items 47, 48, 55, 56, 66, 67, 77 & 78). Other than argument of the motion for award of attorneys' fees, only two appearances were made in the district court on behalf of petitioner. On January 30, 1981, an associate of petitioner's counsel appeared at a status conference in the district court, at which time it was announced to the court that the parties were negotiating settlement. (District Court Docket Sheet at 4). On March 6, 1981, petitioner's counsel's associate made the second and final appearance in district court on behalf of petitioner at a hearing on the motion to dismiss filed by defendants Bell, Powers and Bowen. *Id.*

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[2] The motion to dismiss or for summary judgment of respondents Bell, Bowen and Powers was never ruled on by the district court.

On March 30, 1981, a few months prior to settlement of this case, petitioner's counsel filed with the district court a partial transcript of administrative hearings before the Board. (J.A. 2, 30). In the affidavit to which the Board hearing transcript was attached, petitioner's counsel affirms that the attached transcript "reflects some of the proceedings" before the Board, but contains "numerous typographical and other errors." (*Id.* at 30). The affidavit does not state the purpose for which the transcript was submitted and transcripts of the April, 1978 hearings were not attached to the affidavit.

On October 14, 1981, the district court entered a consent order of dismissal under which the Board agreed to pay $15,400.00 to petitioner and further agreed to treat petitioner as having been reinstated as of April 10, 1974, and having resigned immediately thereafter. (J.A. 32-33). The Board also agreed not to place any derogatory remarks on petitioner's professional record. (*Id.* at 33). The amount of petitioner's attorney's fees was reserved pending agreement of the parties or determination by the district court in the absence of agreement. (*Id.* at 34).

When the parties could not agree on the fee issue, petitioner's counsel submitted a motion requesting the district court to fix his fee (J.A. 35) and filed an affidavit in support of his request. (*Id.* at 37-56). The affidavit requested fees for all time spent in the administrative hearings before the Board, as well as time spent litigating the civil rights case in the district court. (*Id.*).[3]

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[3] The fee application affidavit states that petitioner's counsel's normal hourly rate for commercial work was $60.00 per hour in 1974-76, $90.00 per hour in 1977-79, $105.00 per hour in 1980 and $120.00 per hour in 1981. (J.A. 55). Petitioner's counsel requested that his current hourly rate of $120.00 per hour be applied across the board with a 25% increment. (*Id.* at 55-56). Affidavits of attorneys submitted by respondents state that a reasonable hourly rate for services in the administrative hearings was between $50.00 and $60.00 per hour, and that a reasonable hourly rate for services performed litigating the action in the district court was between $60.00 and $75.00 per hour. (J.A. 68, 71-72). Attorneys testifying for petitioner stated that a reasonable hourly rate for all time expended by petitioner's counsel was $120.00 to $150.00. (R. Item 99 at 8, 34).

The Board opposed the application on the grounds that the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (hereinafter cited as § 1988), does not authorize an award of fees for time spent in optional state administrative hearings and, in any event, the fee claimed by petitioner's counsel was excessive. (R. Item 87).

Following a hearing on petitioner's fee application, the district court, Horton, *J.*, ruled that petitioner was not entitled under § 1988 to fees for legal services performed in the hearings before the Board. (Appendix to Petition for Writ of Certiorari at 28a-43a [hereinafter cited as "App. Pet. Cert."]). The district court awarded petitioner fees in the amount of $9,734.38, based upon an hourly rate of $125.00 for all services rendered in the district court, increased by a 25% upward adjustment,[4] for an aggregate hourly rate of $156.25, plus all claimed expenses. (*Id.* at 41a-43a).

Petitioner appealed the judgment to the United States Court of Appeals for the Sixth Circuit and on August 29, 1983, a unanimous panel of that court, Contie, Krupansky and Guy, *J.J.*, affirmed the judgment of the district court in all respects.[5]

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[4] Petitioner sought the upward adjustment based on the "unusual nature of the hours involved in the Board proceedings." (J.A. 56). The factors articulated by the district court to support the 25% upward adjustment were related solely to the Board hearings rather than the district court proceedings. The district court noted that petitioner's counsel timely requested and was granted a hearing before the Board concerning the "serious" charges against petitioner, that the case was under advisement before the Board for four years, that the Board reaffirmed its decision to terminate, and that there was a strong element of contingency in the case. (App. Pet. Cert. at 41a-43a).

[5] The Board had cross-appealed claiming the fee awarded was excessive. (R. Item 97).

715 F.2d 254. The court of appeals denied petitioner's request for rehearing and suggestion for rehearing *en banc* on November 16, 1983. (App. Pet. Cert. 26a-27a). On April 16, 1984, this Court granted the petition for writ of certiorari.

SUMMARY OF ARGUMENT

Both the district court and the court of appeals below held that the phrase "action or proceeding" contained in § 1988 does not include state administrative hearings not required to be exhausted as a condition precedent to the filing of an action under the federal civil rights statutes enumerated in § 1988. Accordingly, those courts denied petitioner's fee application for services rendered in the Board hearings.

The language and legislative history of § 1988 clearly indicate that Congress did not intend to authorize fee awards for optional state administrative proceedings. In the absence of a clear expression of Congressional intent to authorize fees for such proceedings, the American Rule that parties bear their own attorney's fees precludes an award of fees for work in the Board hearings. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

In *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), this Court determined that § 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), authorizes an award of attorney's fees for services rendered in state proceedings, resort to which is required by Title VII as a condition precedent to filing a civil action under that statute. This Court concluded that since Title VII plaintiffs must pursue certain administrative remedies, Congress must have intended that the word "proceeding" in § 706(k) includes those mandatory administrative proceedings. Since, however, the civil rights acts listed in § 1988 do not require prior resort to state administrative proceedings, it may not be inferred that Congress intended to authorize fees for such proceedings.

Since the Board hearings in the instant case were not a "proceeding" for which fees are authorized under § 1988 this Court need not reach the issue of whether the services rendered in the Board hearings were reasonable. Moreover, the requirement in *Hensley v. Eckerhart*, ___ U.S. ___, 76 L.Ed.2d 40 (1983) that a party prevail on claims for which he seeks fees under § 1988 reinforces the decision below because petitioner was unsuccessful on all claims presented to the Board.

ARGUMENT

I.

The Plain Language Of Section 1988 Does Not Authorize Fee Awards For Work Done In Optional State Administrative Hearings

This Court has recognized that in all cases involving statutory construction, the "starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). The Court assumes "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962). In the absence of "a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

This Court has recognized that, in light of the American Rule which requires each party in a lawsuit to bear its own counsel fees unless there is express statutory authority permitting an award of fees, the determination of when counsel fees may be awarded in claims brought pursuant to federal statutes is peculiarly within the province of the legislature. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). In the absence of express Congressional authorization to award attorney's fees, it is not for the courts "to invade the legislature's province by redistributing litigation costs . . . ." *Id.* at 271.

Section 1988 provides, in pertinent part, that "[i]n any action or proceeding . . . the *court* . . . may allow reasonable attorney's fees." (Emphasis added). Since it is the "court" which is empowered to award attorney's fees "in any action or proceeding" to enforce the provisions of the enumerated civil rights statutes, Congress clearly intended in §1988 to authorize fees only for *judicial* actions or proceedings. *See Latino Project, Inc. v. City of Camden*, 701 F.2d 262, 264 (3d Cir. 1983) ("Congress' use of the term 'court' within the same sentence that contains the words 'civil action or proceeding' leads us to believe that Congress had in mind only a lawsuit when it used those words."); *Blow v. Lascaris*, 668 F.2d 670, 671 (2d Cir.), *cert. denied*, ____ U.S. ____, 74 L.Ed.2d 179 (1982) ("the language of this provision [§ 1988] appears, on its face, however, to refer only to a proceeding or action in a court, not to a state administrative proceeding").

To accept petitioner's argument that the words "or proceeding" in § 1988 must refer to optional state administrative hearings leads to logical anomalies. This is demonstrated by substituting petitioner's suggested reference into the statute. The statute would then read, in pertinent part, that in "any . . . [state administrative proceeding] to enforce a provision of [enumerated civil rights statutes] . . . the court . . . may allow the prevailing party . . . a reasonable attorney's fee. . . ." Clearly, Congress did not intend such a meaning.

First, it is by no means clear that state administrative bodies may entertain "proceedings" to enforce the federal civil rights statutes enumerated in § 1988.* *See, e.g., Derheim v. Hennepin County Board of Social Services*, 524 F. Supp. 1321, 1324-25 (D. Minn. 1981), *aff'd on other grounds*, 688 F.2d 66 (8th Cir. 1982). This concept is reinforced by this Court's recent observation in *Burnett v. Grattan*, ____ U.S. ____, 52 U.S.L.W. 4916, 4919 (U.S. June 27, 1984), that "the dominant characteristic of civil rights actions [is that] they belong in court."

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* In this case, the Board was not empowered under Tenn. Code Ann. § 49-5-501, *et seq.* (1983), to entertain petitioner's federal civil rights claims, to award petitioner the $1,000,000 in damages sought for violation of his civil rights (R. Item 2, at 6-7), or to grant the injunctive relief sought on behalf of a class of black employees and students in the Dyer County school system. (*Id.* at 2-6, 15-18).

Second, assuming that a state administrative body could entertain a "proceeding" to enforce a provision of the enumerated civil rights statutes, Congress only gave the "court" the power to award fees. If a civil rights plaintiff prevailed at the administrative level, he would have no federal claim to assert in court except to request an award of attorney's fees. The courts of appeals have rejected the contention that § 1988 provides an independent claim for attorney's fees for optional state proceedings in the absence of a valid claim on the merits under the civil rights statutes enumerated in § 1988.[7] As prevailing plaintiffs in optional state administrative proceedings cannot recover attorney's fees,[8] it would be anomalous to award fees to those who are unsuccessful in state administrative proceedings, but later prevail in a court action under the federal civil rights statutes. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 60 (1980).

Finally, although petitioner argues that to construe the words "or proceeding" not to include optional state administrative hearings renders those word mere surplusage, (Brief for Petitioner 23-25), when § 1988 is read as a whole, it is apparent that the word "proceeding," if it has independent meaning, refers to

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[7] *Garcia v. Ingram*, 729 F.2d 691, 692 (10th Cir. 1984); *Howard v. Thone*, 710 F.2d 496, 500 (8th Cir. 1983); *Latino Project, Inc. v. City of Camden*, 701 F.2d 262, 264 (3rd Cir. 1983); *Blow v. Lascaris*, 668 F.2d 670, 671 (2d Cir.), *cert. denied*, ___ U.S. ___, 74 L.Ed.2d 179 (1982); *Estes v. Tuscaloosa County*, 696 F.2d 898, 901 (11th Cir. 1983). *Cf. Redd v. Lambert*, 674 F.2d 1032, 1035 (5th Cir. 1982) ("Whether section 1988 does provide an independent cause of action is a closer question."). *See Maxwell v. Department of Social Services*, 436 U.S. 658, 701 n.66 (1978); *Moor v. County of Alameda*, 411 U.S. 693, 703-04 (1973).

[8] Awarding fees for *all* non-mandatory state administrative hearings, including prevailing plaintiffs, would increase the number of civil rights filings in the courts because parties that prevail at the administrative level would then file an action in court to collect attorney's fees under § 1988.

judicial remedies not technically "actions." In *Toner v. Commissioner of Internal Revenue*, 629 F.2d 899, 902 (3d Cir. 1980), *cert. denied*, 450 U.S. 916 (1981), the court of appeals rejected the contention that the word "proceeding" in § 1988 must refer to administrative proceedings for that word to have independent meaning.[9] The court of appeals noted that

> when, for example, the Secretary applies to a district court judge under Section 7604 of the Internal Revenue Code to enforce a summons, he could be said to be initiating a judicial proceeding as opposed to a civil action. Therefore, the word proceeding has a meaning independent of "civil action" without requiring that we expand the statute to encompass administrative proceedings.

629 F.2d at 902. The Federal Rules of Civil Procedure also support this contention. Those rules are made applicable to civil suits, Fed. R. Civ. P. 1, which are denominated "civil actions." Fed. R. Civ. P. 2. Fed. R. Civ. P. 81(a), however, makes the rules applicable in certain other "proceedings" not technically "actions." Among those proceedings are bankruptcy proceedings. Bankruptcy courts have, within the context of adversary proceedings, heard and determined civil rights claims under 42 U.S.C. § 1983, and have awarded attorney's fees to prevailing plaintiffs under § 1988. *See, e.g., Matter of Gibbs*, 12 B.R. 737 (Bankr. D. Conn. 1981). Thus, petitioner's contention that the word "proceeding" has no independent meaning if it is not construed to encompass state administrative proceedings is not well-taken.

In light of the clear language of the statute and the inherent anomalies which would be created by acceptance of petitioner's

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[9] Section 1988 formerly contained a provision to allow attorney's fees to the prevailing party other than the United States "in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charge in violation of, a provision of the United States Internal Revenue Code . . . ." This provision was deleted in 1980.

contention that the word "proceedings" refers to state administrative proceedings, the court of appeals was correct in denying petitioner attorney's fees for time spent in an optional state administrative proceeding.

II.

Relevant Legislative History Indicates That Congress Did Not Intend To Authorize Fee Awards Under Section 1988 For Work Done In Optional State Administrative Hearings

Respondents have demonstrated that the plain language of § 1988 does not authorize a fee award for services rendered in optional state administrative hearings. While petitioner argues that the legislative history of § 1988 supports an award of attorney's fees for services rendered in such hearings (Brief for Petitioner 29-32), respondents contend that the relevant legislative history is to the contrary.[10]

As the court of appeals noted below "[t]he notion that attorney's fees are available only for services rendered in Court permeates the entire [Senate Report]." 715 F.2d at 258. This Court, in *Hensley v. Eckerhart*, ____ U.S. ____, 76 L.Ed.2d 40, 48 (1983), cited the House Report on § 1988 for the proposition that the "purpose of § 1988 is to insure 'effective access to the *judicial process*' for persons with civil rights grievances." (Emphasis added). Moreover, one of the House supporters of the bill which became § 1988 stated that the bill's purpose "is to authorize the award of a reasonable attorney's fee *in actions brought in State or Federal courts*, under certain civil rights statutes, which are presently contained in title 42 and title 20 of the United States Code." 122 Cong. Rec. 35,122 (1976) (remarks of Rep. Drinan) (emphasis added). In sum, references

[10] The Congressional reports are H. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) [hereinafter "House Report"] and S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) [hereinafter "Senate Report"].

to court enforcement of the civil rights statutes enumerated in § 1988 abound in the legislative history.[11]

[11] The following references appear in the Senate Report:

> This amendment to the Civil Rights Act of 1866, Revised Statutes Section 722, gives the Federal courts discretion to award attorneys' fees to prevailing parties in *suits* brought to enforce civil rights acts which Congress has passed since 1866.
>
> • • •
>
> The purpose and effect of S. 2278 are simple - it is designed to allow *courts* to provide the familiar remedy of reasonable counsel fees to prevailing parties in *suits* to enforce the civil rights acts which Congress has passed since 1866.
>
> • • •
>
> In many cases arising under our civil rights laws, the citizen who must *sue* to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights *in court*.
>
> • • •
>
> This bill, S. 2278, is an appropriate response to the *Alyeska* decision. It is *limited to cases arising under our civil rights laws*, a category of cases in which attorneys fees have been traditionally regarded as appropriate. . . .
>
> • • •
>
> There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action *through the courts*.

Senate Report, *supra* note 10, at 1, 2, 3, 5 (emphasis added). Likewise, the House Report contains the following language:

> H.R. 15460, the Civil Rights Attorney's Fees Awards Act of 1976, authorizes the Courts to award reasonable attorney fees to the prevailing party in *suits* instituted under certain civil rights acts.
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> • • •

Against this pervasive theme of the legislative history, petitioner advances several arguments. First, petitioner contends that the citation of *Shelley v. Kraemer*, 334 U.S. 1 (1948), in the Senate Report, and this Court's holding in *Maine v. Thiboutot*, 448 U.S. 1 (1980), that attorneys fees are available under § 1988 in state court proceedings, indicate that Congress intended that fees "be available for legal services for the enforcement of civil rights regardless of the forum involved." (Brief for Petitioner 29-30). In both *Shelley* and *Thiboutot*, however, the prevailing parties enforced civil rights in court actions, not optional state administrative proceedings. No support can be found in these cases for the proposition that § 1988 permits an award of fees to petitioner for services rendered in the Board hearings.

Petitioner further argues that one of the purposes of § 1988 was to "provide for fees for work done pursuing remedies alternative to Title VII and other statutes." (Brief for Petitioner 31). While the Senate Report indicates that § 1988 was designed to rectify the anomaly that fees could be awarded, for example, for an employment discrimination action under Title VII, but not for the same action brought under 42 U.S.C. § 1981, Senate Report at 4, there is nothing in the legislative history to indicate

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In many instances where these laws are violated, it is necessary for the citizen to initiate *court action* to correct the illegality. Unless the *judicial remedy* is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the *courts*.

House Report, *supra* note 10, at 1 (emphasis added). Further, in defining the scope of the bill, the House Report states § 1988 "would apply to *actions brought under* seven specific sections of the United States Code." *Id.* at 3 (emphasis added).

Throughout the floor debates concerning § 1988, members of Congress consistently referred to the award of attorney's fees under § 1988 in "suits," "litigation," and "civil actions." *See, e.g.*, 122 Cong. Rec. 31,830-31 (remarks of Sen. Allen), 31,832-33 (remarks of Sen. Helms), 32,185 (remarks of Sen. Tunney), 32,929-30 (remarks of Sen. Scott), 35,124 (remarks of Rep. Railsback) (1976).

that Congress intended to authorize fees for optional state administrative hearings. Moreover, denial of fees for work in such a hearing prior to filing suit under one of the statutes enumerated in § 1988 is consistent with Congress' intent that pursuit of such remedies is not required as a precondition to enforcement of the enumerated civil rights statutes. *See generally Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982).

In sum, the legislative history of § 1988 fails to lend any support to petitioner's claim and, in fact, supports the conclusion that Congress did not intend to authorize fee awards under § 1988 for work done in optional state administrative hearings.

III.

The Court Of Appeals' Decision Is Consistent With The Analysis Applied In This Court's Decision In *New York Gaslight Club, Inc. v. Carey*

Respondents contend that while the result in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), does not control the resolution of the instant case, the analysis applied by this Court in *Carey* supports respondents' contentions that attorney's fees are not awardable under § 1988 for work done in optional administrative proceedings.

In *Carey*, this Court held that § 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (k), authorizes an award of attorney's fees for services rendered in state proceedings, resort to which is *required* by Title VII as a condition precedent to filing an action under that statute. In reaching this conclusion, this Court analyzed the language and history of § 706(k) and the relationship between state proceedings for which attorney's fees were sought and Title VII's enforcement mechanisms. 447 U.S. at 61. Respondents have demonstrated that neither the language nor the legislative history of § 1988 supports an award of attorney's fees for the Board hearings in the instant case. Analysis of the final factor considered in *Carey*, that is, the rela-

tionship between the state proceedings and the enforcement mechanisms for the civil rights statutes enumerated in § 1988, reinforces the conclusion that petitioner's claim for attorney's fees for services performed in the Board hearings was properly denied.

In holding that Congress intended to authorize awards of attorney's fees for state proceedings required to be pursued under Title VII, this Court noted in *Carey*:

> It is clear from this scheme of interrelated and complimentary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is *mandated*, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief.

447 U.S. at 65 (emphasis added) (citation omitted). This Court concluded, therefore, that since Title VII requires plaintiffs to pursue certain state remedies, denial of attorney's fees "would force the complainant to bear the costs of *mandatory* state and local proceedings and thereby would inhibit the enforcement of a meritorious discrimination claim." 447 U.S. at 63 (emphasis added).

In contrast to the interrelated and complimentary state and federal enforcement mechanisms under Title VII which mandate initial resort to state administrative remedies, the civil rights statutes enumerated in § 1988 do not require resort to any administrative proceeding as a precondition to filing a court action. *See, e.g., Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982) (§ 1983); *Cannon v. University of Chicago*, 441 U.S. 677, 706-08 n.41 (1979) (Title IX); *Long v. Ford Motor Company*,

496 F.2d 500, 503 (6th Cir. 1974) (§ 1981).[12] Since the civil rights statutes invoked by petitioner did not mandate resort to administrative hearings before the Board, the denial of petitioner's claim for attorney's fees for work related to the Board hearing did not "inhibit the enforcement of a meritorious [civil rights] claim." *Carey*, 447 U.S. at 63.

A majority of courts that have considered *Carey* have refused to approve an award of attorney's fees under § 1988 to either parties that prevail in nonmandatory state proceedings and thereafter seek fees in federal court[13] or parties that are unsuccessful in nonmandatory state proceedings but thereafter prevail in a federal civil rights action.[14] These courts have rejected the argument that *Carey* authorizes an award of attorney's fees for services rendered in optional state administrative proceedings.

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[12] Petitioner apparently concedes that exhaustion of administrative remedies was not required as a prerequisite for filing an action under the statutes invoked by petitioner in the district court. (Brief for Petitioner 23-25).

[13] *Garcia v. Ingram*, 729 F.2d 691, 692 (10th Cir. 1984); *Horacek v. Thone*, 710 F.2d 496, 499 (8th Cir. 1983); *Latino Project, Inc. v. City of Camden*, 701 F.2d 262, 264 (3d Cir. 1983); *Estes v. Tuscaloosa County*, 696 F.2d 898, 901 (11th Cir. 1983); *Redd v. Lambert*, 674 F.2d 1032, 1037 (5th Cir. 1982); *Derheim v. Hennepin County Bureau of Social Services*, 524 F.Supp. 1321, 1324 (D. Minn. 1981), *aff'd on other grounds*, 688 F.2d 66 (8th Cir. 1982); *Blow v. Lascaris*, 523 F.Supp. 913 (N.D.N.Y. 1981), *aff'd*, 668 F.2d 670 (2d Cir.), *cert. denied*, ____ U.S. ____, 74 L.Ed.2d 179 (1982).

[14] *Webb v. County Board of Education of Dyer County*, 715 F.2d 254, 256-58 (6th Cir. 1983); *Venuti v. Riordon*, 702 F.2d 6, 9 (1st Cir. 1983). *But see Cicchon v. City of Chicago*, 686 F.2d 511, 524-25 (7th Cir. 1982) (district court deferred civil rights action pending completion of administrative hearing); *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982) (district court exercised *Pullman* abstention pending resolution of state judicial proceedings).

Denial of fees for pursuit of optional state remedies provides lower courts with a clear line of demarcation between legal services performed in court for which fees may be awarded under § 1988 and legal services performed in other forums for which civil rights plaintiffs, if they choose to pursue them, must bear the expense. Such a clear line is in accordance with this Court's analysis in *Carey*, and supports rejection of petitioner's claim for attorney's fees for the Board hearings in this case.

IV.

The Court of Appeals' Decision Is Consistent With The Analysis Applied In This Court's Decision In *Hensley v. Eckerhart*

Although neither the language or history of § 1988 nor consideration of the enforcement mechanisms of the statutes enumerated in § 1988 support an award of fees in the instant case, petitioner attempts to expand the scope of § 1988 by relying upon this Court's opinion in *Hensley v. Eckerhart*, ____ U.S. ____, 76 L.Ed.2d 40, 52 (1983). Petitioner argues that the district court should have awarded counsel fees for the Board hearings because the time was "reasonably expended." Respondents contend that because § 1988 does not permit an award of fees for work done in an optional state administrative proceeding, the question of whether petitioner's counsel's work in the Board hearings was reasonably expended does not arise. Moreover, *Hensley* on its facts does not support petitioner's contentions and, in fact, the analysis applied by the Court in *Hensley* supports denial of the award of fees sought by petitioner.

In *Hensley*, this Court was asked to decide "whether a partially prevailing plaintiff may recover an attorney's fee [under § 1988] for legal services on unsuccessful claims." 76 L.Ed.2d at 46. Plaintiffs presented all of their claims to the district court in *Hensley* and were successful on some but not on others. Review

was granted by this Court "to clarify the proper relationship of the results obtained to an award of attorney's fees." 76 L.Ed.2d at 50.

This Court held that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988." 76 L.Ed.2d at 54. As this Court noted: "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained." 76 L.Ed.2d at 52. When a party does not prevail on claims distinct from those upon which he prevails, counsel fees may not be awarded for time spent on the unsuccessful claims. *Id.* at 51.

Petitioner's assertion that it was "reasonable" to participate in Board hearings does not entitle him to fees under *Hensley* because he did not prevail in the claims presented in the separate and distinct hearings before the Board. The critical factor of success required in *Hensley* is not present in this case and fees for time spent in Board hearings were properly denied.

Moreover, neither the district court nor the court of appeals below made any findings of fact that the legal services rendered petitioner in the Board hearings were "reasonable" under § 1988 and the decisions interpreting that statute. Consideration of that question was pretermitted by those courts' determination that § 1988 does not authorize fees for time spent in optional administrative proceedings.

Petitioner now requests that this Court, in the absence of findings below, hold that all of the time claimed by petitioner's counsel in the Board hearings is "reasonable" as either pre-complaint investigation or discovery utilized in response to a motion to dismiss or for summary judgment in the district court. Respondents contend that the Board hearings were not a reasonable pursuit of either objective in the instant case.

For example, ten of the hours claimed by petitioner's counsel at the administrative level are for travel to Dyer County for a Board hearing that was not held because witnesses were not subpoenaed. (J.A. 45). This problem would not have been encountered either in normal pre-complaint investigation[17] or in pretrial discovery in the district court. Petitioner's argument that he "discovered" the Board's case in the administrative hearings is also untenable in light of the fact that neither petitioner's supervisor nor the superintendent of the Board, who is responsible under Tenn. Code Ann. § 45-5-511(3) & (5) (1983) for suspending teachers and giving notice of dismissal, testified following objection of petitioner's counsel. (J.A. 61). Because the district court did not resolve the motion to dismiss or for summary judgment of several respondents, the utility of submission of the Board transcripts as a response to the motion is problematical at best.[18]

---

[17] Pre-complaint investigation in a civil rights case imposes no unique burden on counsel. As this Court recently noted, the Federal Rules of Civil Procedure "require nothing more than a plain statement of the grounds for relief" even in civil rights cases, and "there is nothing inherent in a claim asserted under § 1981, § 1983, or § 1985, in light of modern pleading rules, that makes such a claim invariably more difficult to investigate than a claim asserted under state law." *Burnett v. Grattan*, ____ U.S. ____, 52 U.S.L.W. 4916, 4921 (U.S. June 27, 1984) (per Rehnquist, *J.*, concurring in the judgment).

[18] In any event, it appears that the district court considered work performed by petitioner's counsel in the Board hearings in arriving at the 25% upward adjustment to the fee award for services rendered in the district court. *See* note 5, *supra*. While the factors articulated by the district court concerning this upward adjustment appear to conflict with the recent decision in *Blum v. Stenson*, ____ U.S. ____, 79 L.Ed.2d 891, 901-04 (1984), when viewed solely in light of the services rendered in the district court, the upward adjustment compensates petitioner's counsel for work performed in the administrative proceedings.

Moreover, because the Board hearings formed the basis of petitioner's due process claim in the district court they "are part of the wrong of which plaintiff's federal civil rights action complained" and counsel fees for these hearings should be denied. *See Venuti v. Riordan*, 702 F.2d 6, 9 (1st Cir. 1982).

In sum, Respondents contend that the question of reasonableness does not arise on the facts of this case. Moreover, while *Hensley* is not directly controlling in the instant case, its critical requirement of success supports respondent's contention that fees are not awardable under § 1988 for the Board hearings where petitioner did not prevail. The services performed in the administrative proceedings were not, in any event, reasonable under § 1988, an issue passed upon by neither of the courts below.

CONCLUSION

For the foregoing reasons, respondents contend that the decision below should be affirmed.

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SUPPLEMENTAL BRIEF

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No. 83-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LEONARD WEBB,
Petitioner,

vs.

COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, *et al.*,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Pursuant to Rule 35.5 of the Rules of the Supreme Court of the United States, Respondents submit this Supplemental Brief.

Smith v. Robinson Rejects Application of *Carey* to the Instant Case

Petitioner argued that "fees are recoverable [for legal services performed in optional state administrative proceedings] under this Court's decision in *New York Gaslight Club v. Carey.*" (Brief for Petitioner 20). Respondents replied that this Court's decision to award fees in *Carey* was based upon Title VII's requirement that, under the facts in that case, plaintiff was required to invoke state administrative remedies before filing a Ti-

the VII claim in federal court. (Brief for Respondents 15-18). Since the civil rights statutes invoked by petitioner in the instant case did not require petitioner to engage in hearings before the Dyer County Board of Education prior to proceeding under those statutes in the district court, the instant case is not only factually distinguishable from *Carey*, the rationale of *Carey* actually supports denial of fees for optional state administrative proceedings. (*Id.*).

In *Smith v. Robinson*, 468 U.S. ____, 82 L.Ed.2d 746 (July 5, 1984), which was not available in time to be included in the Brief for Respondents, this Court recognized the inapplicability of *Carey* as authority for awarding counsel fees for optional state administrative proceedings under the Civil Rights Attorneys' Fees Award of 1976, 42 U.S.C. § 1988:

> The District Court in this case relied on similar reasoning - that Congress could not have meant for a plaintiff to be able to circumvent the EHA administrative process - and concluded that a handicapped child asserting an equal protection claim to public education was required to exhaust his administrative remedies before making his § 1983 claim. *See Turillo v. Tyson*, 535 F. Supp. 577, 583 (R.I. 1982), cited in the District Court's oral decision of April 30, 1982, App. to Pet. for Cert. A40. Because exhaustion was required, the court, relying on *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 L.Ed.2d 723, 100 S.Ct. 2024 (1980), concluded that attorney's fees were appropriate under § 1988 for work performed in the state administrative process.
>
> The difference between *Carey* and this case is that in *Carey*, the statute that authorized fees, Title VII, also required a plaintiff to pursue available state administrative remedies. In contrast, nothing in § 1983 requires that a plaintiff exhaust his administrative remedies before bringing a § 1983 suit. *See Patsy v. Florida Board of Regents*, 457 U.S. 496, 73 L.Ed.2d 172, 102 S.Ct. 2557 (1982). If §1983 stood as an independent avenue of relief for petitioners, then they could go straight to court to assert it.

82 L.Ed.2d at 764 n.14.

As demonstrated in *Smith*, the distinction between *Carey* and the instant case is that nothing in the civil rights statutes invoked by petitioner requires exhaustion of state administrative remedies before filing suit under those statutes in federal court. If a plaintiff presents his claim to a state administrative agency, he does so at his choosing. Section 1988 does not authorize a fee award under those circumstances.

CONCLUSION

Respondents previously demonstrated that petitioner is not entitled under § 1988 to an award of counsel fees for services rendered in optional state administrative proceedings. This Court's rejection in *Smith v. Robinson* of the argument that *Carey* authorizes fee awards under § 1988 for optional state administrative proceedings supports affirmance of the court of appeals' decision in the instant case.

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REPLY

BRIEF

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REPLY BRIEF FOR PETITIONER

Petitioner wishes to respond to a number of the factual and legal assertions made by the respondents and amicus curiae in their briefs.

I.

FACTUAL ISSUES

1. The respondents suggest that the time spent in the administrative process has in some way or degree been compensated for through the 25% multiplier used by the district court. This assertion is simply not supported by the record. The decision of the trial court makes it clear that it discussed the fact of the lengthy pendency of this case before the local school board only as a factor which increased the contingent nature of the litigation. Of course, the district court squarely held that it could not compensate petitioner for the time expended in pursuing the administrative process, and there is nothing in its discussion of the contingency factor that is inconsistent with that holding, which

presents the issue before this Court. Although the respondent appealed the contingency question to the Sixth Circuit, it did not file a cross-petition for certiorari here. Therefore, it cannot now seek to raise the validity of the contingency adjustment.

2. The respondents assert, without citing authority, that the Board of Education was not empowered to entertain the petitioner's federal civil rights claims. However, the statute establishing the right to a hearing contains no limitation whatsoever on the grounds on which an employee may challenge a decision to discharge him, but rather states that a teacher "shall have full opportunity to present his contentions." Tenn. Code Ann. § 49-5-512(4). In fact, in this case the Board of Education received

lengthy testimony concerning petitioner's claim that the decision to discharge him was racially discriminatory. Surely it cannot seriously be argued that if, for example, there had been an admission that petitioner had been fired because of a policy that black teachers could not discipline white students, the Board could not reverse the decision and reinstate him.

3. Respondents assert that a state administrative tribunal would not have the authority itself to award fees. However, such is apparently not the case under Tennessee law. The statute that provides for the right to a hearing also provides that the "losing party" shall pay the costs of the proceeding. Tenn. Code Ann., § 49-5-512(5). There appears to be nothing that would prevent the Board from paying a

teacher's attorney when it awarded costs in the teacher's favor. In any event, even if a particular state administrative agency itself did not have authority to award fees, a state court could do so pursuant to 42 U.S.C. § 1988. See, Maine v. Thiboutot, 448 U.S. 1 (1980).

4. Respondents also urge that certain of the attorney time expended during the Board hearings should not have been so expended. This argument, however, does not deal with the issue of whether time can be compensated at all, but whether particular work done was in fact reasonable. Neither the district court nor the court of appeals addressed the question whether the time requested was reasonably expended since they ruled that as a matter of law none of it was compensible.

II.

LEGAL ISSUES

1. Both the respondents and amicus attempt to extend this Court's decision in Hensley v. Eckerhart, ____U.S. ____, 76 L.Ed.2d 40 (1983), by arguing that it holds that a prevailing party be compensated only for those parts of a proceeding in which he prevails. Hensley, however, does not so hold. Rather, it was concerned with reasonable fees and awards vis-a-vis "different claims," 76 L.Ed.2d at 51 (emphasis added), and not entitlement vis-a-vis different phases of enforcing a claim in an action or proceeding, as respondents would have it. It would be an absurd and burdensome waste of a court's time if it had to separate out each motion, discovery request, or ruling on evidence on which the prevailing

party lost. This is what the reading of Hensley urged by respondents and amicus would require.[1]

But Hensley relied on the legislative history of § 1988 which cites Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), where the district court squarely held that a prevailing plaintiff should not be denied fees for a lost motion for a preliminary injunction, and Davis v. Los Angeles, 8 E.P. D. ¶ 9444 (C.D. Cal. 1974), in which fees were similarly allowed for the entire proceeding even though various motions had been lost.

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[1] Indeed, the logic of respondents' position would require fees to be denied to a plaintiff for work done at the trial court level if he lost at trial, even though he won an appeal and obtained complete relief. Such, of course, is not the law. See, Newman v. Piggie Park Enterprises, 377 F.2d 433, 436-37 (4th Cir. 1967), modified, 390 U.S. 400 (1968).

Under Hensley, of course, it is the ultimate result that matters. For, as this Court held, "the district court should focus on the significance of the overall relief obtained by the plaintiff." 76 L.Ed.2d at 51.

2. Neither respondents nor amicus squarely address petitioner's central argument, that since the attempt to obtain relief through the administrative process was time reasonably expended to vindicate federal civil rights, and since such time would have been billable to the client in the exercise of normal billing judgment, under Hensley the time is compensible.

As we pointed out in our main brief the time was spent doing work that would otherwise have had to be done both before the complaint was filed and in

discovery. Although respondent tries to minimize the extent to which a case should be investigated before a complaint is filed, this Court has recently expressed the opposite view in Burnett v. Grattan, ___ U.S. ____, 82 L.Ed.2d 36, 45 (1984):

> Litigating a civil rights claim requires considerable preparation. An injured person must recognize the constitutional dimensions of his injury. He must obtain counsel or prepare to proceed pro se. He must conduct enough investigation to draft pleadings that meet the requirements of federal rules. . . . . At the same time, the litigant must look ahead to the responsibilities that immediately follow filing of a complaint. He must be prepared to withstand various responses such as a motion to dismiss as well as to undertake additional discovery.

The work done in the administrative process here was directly parallel to and accomplished many of these tasks.

3. Both the respondents and amicus, in responding to petitioner's argument that the term "or proceeding" will have no meaning if it does not encompass state administrative proceedings, rely on language in an earlier version of § 1988 which provided for fees in certain proceedings brought under the Internal Revenue Code. Their discussion entirely overlooks the history of this provision.[2]

Section 1988 as first proposed in both the House and the Senate did contain the word "proceedings" but did not contain the language relating to proceedings brought by the Internal Revenue Service.

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[2] With all due respect to the court of appeals, the decision in Turner v. Commissioner of Internal Revenue, 629 F.2d 899 (3rd Cir. 1980) also does not adequately discuss this history.

Thus, as it passed the House and as it was reported out of the Senate committee, the statute read:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, Revised Statutes Section 722 (42 U.S.C. Sec. 1988) is amended by adding the following: "In any action or proceeding to enforce a provision of section 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs".

H.R. 15460 (94th Cong., 2d Sess.); S. 2278 (94th Cong., 2d Sess.). Since the provision covered an "action or proceeding" without any reference whatsoever to the Internal Revenue Code, Congress must have contemplated that something else would be covered by the statute.

the provision dealing with the Internal Revenue Code was only inserted during the debates on the Senate floor to end a filibuster,[3] and when the Equal Access to Justice Act was enacted, (5 U.S.C. § 504; 28 U.S.C. § 2412), the provision was deleted from § 1988.[4] However, the language "action or proceeding" was retained, again showing that Congress intended that "proceeding" encompass something other than a court action or a "proceeding" to enforce the Internal Revenue Service. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), establishes that the term "or proceeding" includes all available administrative proceedings, state or

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3 122 Cong. Rec. p. 17069-70 (daily ed., Sept. 7, 1976).

4 Pub. L. 96-481, Sec. 205(c).

federal.

4. Respondents and amicus attempt to rely on various snippets from the legislative history of § 1988 to urge that, despite its clear language, the intention of Congress was that the statute only cover actions in court. Of course, it is axiomatic that the clear language of a statute cannot be so overridden. See, e.g., Chandler v. Roudebush, 425 U.S. 840 (1976).

In any event, the statements quoted by respondents and amicus are at best ambiguous. None of them state that administrative proceedings are not to be covered. At most, they show a natural concentration on the main concern of the

Act's supporters, that court proceedings, with their attendant high costs, be fully compensated for.

Indeed, contrary to respondent's position, other portions of the legislative history are fully consistent with an intent to cover all available alternative routes for settling constitutional and civil rights claims.[5] Thus, the House Report makes it clear that a disposition of a claim short of adjudication by a court is to be encouraged by ensuring that fees will be awarded. H. Rep. No. 94-1558, p. 7. The report cites with

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An intent not to penalize, while not requiring, recourse to available state remedies is also consistent with the intent of Congress when it originally enacted 42 U.S.C. § 1983. As this Court noted in Patsy v. Florida Bd. of Regents, 457 U.S. 496, 506 (1982), ". . . many legislators interpreted [§1983] to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief."

approval Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976),[6] a case with facts strikingly similar to the present one. In Parker the plaintiff, a federal employee claiming employment discrimination, had unsuccessfully pursued her administrative remedies and had filed an action in federal court. Following the filing of the action, the agency reversed itself and found that there had been discrimination. The case was then settled, and the district court awarded fees for both the administrative and court proceedings.

Thus, when it enacted § 1988 containing the same language "action or proceeding" that was included in Title VII, Congress was fully aware that that

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Aff'd sub nom. Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977), cited with approval in New York Gaslight Club, Inc. v. Carey, 447 U.S. at 62, n. 2.

phrase had been interpreted to include administrative proceedings. It must, therefore, be assumed that a similar interpretation was intended to govern the award of fees under the new Act. See Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979).

5. Finally, respondent and amicus urge that policy considerations support their attempt to read the words "or proceeding" out of the Act. Not only may not alleged policy concerns override the language and intent of a statute (Chandler v. Roudebush, 425 U.S. at 863-64; Patsy v. Florida Bd. of Regents, 457 U.S. 496, 512-13 (1982)), but, as we have discussed in our main brief, sound policy considerations support the clear meaning of the Act. Again, encouraging recourse to alternative available remedies will

"[help] to lessen docket congestion" (H. Rep. No. 94-1558, p. 7). Here, although petitioner was unsuccessful at the administrative level, his pursuit of that remedy manifestly assisted the speedy resolution of the case once it had been filed in court.[7] Moreover, claims that might have led to the filing of a federal suit may be winnowed out if parties are encouraged to pursue an available alterna-

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7 A person who successfully pursues a state remedy may be awarded fees at the administrative level. Cf. Smith v. Califano, 446 F. Supp. 535 (D.D.C. 1978), holding that federal agencies have the power to award fees in Title VII actions even though the statute, 42 U.S.C. § 2000e-5(k), speaks of awards by a court. Subsequently, the Equal Employment Opportunity Commission amended the regulations governing federal EEO claims to authorize such awards. 29 C.F.R. § 1613.271(c). Alternatively, fees may be awarded by a state court, see supra at pp. 4-5. Thus, it is not necessarily the case that an action would have to be filed in federal court for fees in such a case.

tive remedy that can demonstrate that a perceived consitutional violation does not in fact exist. There are no policy considerations which would support a result that would not only encourage, but virtually compel, a litigant to file in federal court at the earliest possible time if he is to obtain full relief. New York Gaslight Club, Inc. v. Carey, 447 U.S. at 63, 66 n. 6.

Conclusion

The decision below, and the arguments of respondents, come down to the following reasoning: because resort to a mandatory administrative proceedings is a reasonable expenditure of attorney time, then the only reasonable expenditure of time is recourse to a mandatory proceeding. Of course, the conclusion is a perfect example of a false syllogism along the

order of, "since all rabbits are animals then all animals are rabbits." Section 1988 no where refers to mandatory work, but requires fees for reasonable work. Since petitioner's attempt to obtain relief through a proceeding before the school board was reasonable, it is compensible under the Act.

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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